Faculty of Law
University of Helsinki

Law, Politics and Paradox

Orientations in Legal Formalism

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Doctoral dissertation

To be presented for public discussion with the permission of the Faculty of Law of the University of Helsinki, in Lecture Hall P674, Porthania, on the 25th of September 2020 at 12 o'clock.

Helsinki 2020

ISBN 978-951-51-6349-3 (paperback)
ISBN 978-951-51-6350-9 (PDF)

Unigrafia
Helsinki 2020

In memory of Sari

Abstract

The aim of this dissertation is to analyze the significance of the logical phenomenon of paradox for law and its relation to politics. I examine a selection of formal legal and political theories that in different ways understand law as a totality of norms, communications or behaviors, how paradox emerges in these theories, and what implications their understanding of paradox has for the relationship between law and politics. I argue that these legal and political theories can be meaningfully and in a novel way grouped according to their orientation to legal totality and paradox.

To my knowledge, there is no research systematically mapping orientations to paradox in legal theory. It is the objective of this dissertation to fill this lack. Paradox presents challenges for formal thought, i.e. thought that analyzes the logic of totalities. Law, considered as a totality or form, gathers a plurality of entities under a common denominator and into a legal order. It is in reflecting on such formalization that we encounter paradoxes. This work aims to contribute to a growing literature on the implications of formalism for contemporary social and political thought by providing a legal theoretical perspective hitherto missing in these discussions.

I use as a heuristic device a grouping of formal thought presented by the philosopher Paul M. Livingston. According to this grouping, there are three main orientations in contemporary formal thought to totality: the constructivist-criteriological, the paradoxico-critical and the generic orientation. These orientations arise on grounds of the "metalogical choice": they prefer to view totality (such as law as a system or order) either as complete but inconsistent (the paradoxico-criticism), or as consistent but incomplete (the constructivist-criteriological and the generic orientation). I will apply, and modify when necessary, this categorization in order to analyze the theories of Hans Kelsen, Niklas Luhmann, Giorgio Agamben, Alain Badiou and Hans Lindahl, and to provide a systematic mapping of how the nature of law as a totality is understood in contemporary formal legal-political thought.

Accounts of modern law encounter a paradox, I argue, if they observe law as an autonomous, self-referential totality that claims for itself the right to draw a distinction between itself and non-law. The paradox of autonomous law is that it cannot consistently show that it is itself legal as a totality. The basic problem that this implies is that the legal system or collective is unable to legitimate its existence and identity in response to challenges in any other way than by drawing on its own resources – which precisely is what the challenge targets in the first place. If we think of law as offering a framework within which questions of justice and injustice can be answered, the paradox emerges when we question the justice of this framework itself.

The dissertation defends the paradoxico-critical orientation. It argues that the legal system is a paradoxical totality, which implies that there is no neutral metalanguage, such as natural law, that could solve the problem of law's self-reference for good. This challenges legal theory to show how the problem of nihilistic

relativism, the mere perpetuation of the self-referential legal system, can be mitigated and law's normative authority in society rethought.

In Chapter 1, I define the notion of paradox, explicate its meaning and role in formal thought and motivate its application to legal theory. In Chapter 2, I show that in his theory of the basic norm, Kelsen can be understood as oscillating between the constructivist-criteriological position and the paradoxico-criticism, between an attempt at guaranteeing legal order's consistency in a metalanguage, i.e. legal science, and an acknowledgement of law as an inconsistent totality. In Chapter 3, I interpret Luhmann as a paradoxico-evolutionary thinker: he observes the legal system as constitutively inconsistent but emphasizes the ways in which the system seeks to make this inconsistency unproblematic for functional reasons. In Chapter 4, I show that in systems theory, just like in Kelsen's pure theory, the politics of the paradox remains unarticulated. I also show that, for Agamben, a paradoxico-critical thinker, the paradoxical articulation of law and politics is exposed in the state of exception, which, in his analysis, has become the new normal, requiring "messianic" politics to deactivate the whole nihilistic sovereign-legal apparatus. For Badiou, the representative of the generic orientation, which I discuss in Chapter 5, what can be said within a language, and by implication a legal system, is pre-determined by that language. Politics, the desire to say the unsayable, is thrown fully outside the language and the legal system to a position from which law's incompleteness, its incapacity to offer space for justice and politics, can only be disclosed. Both Agamben and Badiou, thus, think about politics as "post-juridical." In Chapter 6, I show that the very inconsistency and paradox at the heart of the legal order is, for Lindahl's paradoxico-criticism, the site of the politics of its limits. This dissertation, then, concludes that the paradoxical limits of the legal totality can be understood as the site of politics in law. Taking law's paradox into account allows for a non-nihilistic conception of politically contestable law and legal authority.

Acknowledgements

It is quite common, I am sure, that the outcome of a research project looks different from how it was originally conceived. At the beginning of my doctoral research, I intended to write on the phenomenology of human rights. That project underwent a metamorphosis, perhaps greater than usual, after I encountered what could be called the paradox of human rights. Human rights can be said, on the one hand, to articulate a central purpose of modern positive law, namely, safeguarding human dignity, and in this sense, they are irreducible to law. On the other hand, they are legal rights and only accessible through the mediation of the law. By implication, there is an element in the legal order that is both inside the order as one of its norms and outside the order as the source of justification of all its norms. I, then, decided to explore in my dissertation this paradoxical structure more generally, explicate how it can be found in the work of several legal and political theorists, and analyze its significance for the relationship of law and politics.

It is a somewhat unforgiving task to write a doctoral dissertation on paradox – that is, on a phenomenon that, by definition, makes little sense, at least little common sense. In this endeavor of excavating the sense of non-sense, I have profited from the help, generosity and friendship of many people. Finally realizing what I want to say in my dissertation would not have been possible without all the encounters that I had the privilege to experience nor without the gradual institutional move from philosophy to law.

I began my doctoral studies at the Department of Practical Philosophy in the Faculty of Social Sciences. I want to thank my first supervisor, University Lecturer Kristian Klockars, for generously helping me to take the very first steps of my postgraduate studies. Early in my doctoral research, I was also greatly inspired by the fabulous research community that has, during the past ten years or so, emerged around the philosophy research seminar lead by Professor Sara Heinämaa. I want to thank Timo Miettinen, Sanna Tirkkonen, Anniina Leiviskä, Simo Pulkkinen, Joona Taipale, Juho Hotanen, Julius Telivuo, Hermanni Yli-Tepsa, Malin Grahn-Wider, Saara Hacklin, Virpi Lehtinen, Marko Gylén, Fredrik Westerlund, and all others who participated in the seminar at the time. Special thanks to Docent Jussi Backman for generously reading and commenting on the chapter on Badiou and helping me to improve it. Special thanks also to Ari-Elmeri Hyvönen for our discussions on Arendt. Iina Koskinen, Irina Poleshchuk and Erika Ruonakoski have been dear friends and colleagues during the past years, and I wish to thank them wholeheartedly for their friendship and support.

Professor Sara Heinämaa introduced me to the branch of contemporary philosophy called phenomenology. Thank you for guiding me through the bachelor's and master's studies in philosophy and for helping me, early in the doctoral project, to formulate my research ideas. I have continued to draw on your teaching and impeccable sense for linguistic expression throughout this project.

In 2012, I was accepted as a member of the nationwide Law in the Changing World Doctoral Program. I had the great privilege to work at the Faculty of Law until 2016, when I moved to Switzerland with my family. I want to thank, in particular, Professor and the former Dean of the Faculty of Law, Kimmo Nuotio, and the current Dean, Professor Pia Letto-Vanamo, for having taken me, a philosopher, as a full-fledged member of the Law Faculty.

My heartfelt thanks to Professor Panu Minkkinen, my supervisor at the Faculty of Law, for his untiring support and help. I have always been able to count on his advice and encouragement, even when I have myself doubted the feasibility of the project. There is no problem, big or small, for which Panu could not find a solution in the shortest amount of time. Thank you, Panu, for your willingness to share your knowledge and for your engagement and care, which enabled me to successfully complete my research.

At the Faculty of Law and within the framework of the doctoral program, I have also had the pleasure to enjoy the intellectual company of Ari Hirvonen, Susanna Lindroos-Hovinheimo, Kaarlo Tuori, Visa Kurki, Juho Joensuu, Paul Tiensuu, Esa Kolehmainen, Tuomas Tiittala, Beata Mäihäniemi, Riikka Koulu, Liisa Nieminen, Kati Nieminen, Ukri Soirila, Samuli Hurri, Marta Maroni, Jouni Westling, Tomi Hämäläinen, Marjo Rantala, Niklas Vainio, Niko Soininen and many others. Thank you all for sharing your ideas and being great sources of inspiration. Special thanks to the lovely Yihong Zhang for our long lunches together and for being such a fabulous friend.

I have been very fortunate to be able to participate as a visiting doctoral researcher in the activities organized by the Globalisation and Legal Theory Doctoral Program, a collaborative program organized by the Universities of Glasgow, Louvain, Antwerp and Tilburg. Within this framework, I visited the Law Schools in Glasgow and Tilburg on several occasions to present my work. I want to thank all the great people I met during my short stays, in particular Bert van Roermund, Daniel Augenstein, Carl Lewis, Lukasz Dziedzic, Jorge Restrepo, Nikolas Vagdoutis and Chiara Raucea.

Special thanks to Professor Hans Lindahl at the Tilburg Law School for inviting me to present my work on paradox in the thought of Hannah Arendt (which I finally decided to publish separately from this dissertation) at the Legal Philosophy Research Seminar in Tilburg. I thank you for having generously agreed to act as my opponent. As is evident to anyone who glances through my dissertation, your work has greatly influenced my research.

My sincerest thanks also to Professor Emilios Christodoulidis at Glasgow Law School for the encouragement that you have given to me, as well as for the discussions we had in Glasgow and Helsinki. Your insights into systems theory, law, politics and critique have been crucial for my work. I also want to thank you for having read my dissertation as one of my pre-examiners and for giving such positive feedback and fruitful critical comments, which helped me to improve it.

I also wish to thank Professor Susanna Lindberg, my other pre-examiner. Already as a young master's student at the Department of Theoretical Philosophy in

Helsinki, I was greatly impressed by your lectures, your thorough knowledge of German and French philosophy as well as the beauty and intellectual precision of your expression. I was delighted to have you as my other pre-examiner and to receive such positive comments on my work from you.

My warmest thanks to Senior Lecturer Martina Reuter, Associate Professor Ferdinando Menga and Professor Sophie Loidolt for your encouragement and comments, which have, on different occasions, contributed to my work.

This dissertation would not have been possible without the financial support provided by the Faculty of Law, Aili and Brynolf Honkasalo Foundation, Research Network Subjectivity, Historicity, Communality: Studies in Philosophy and Political Sciences, and the Chancellor's Travel Fund. I thank all these institutions for their generous support.

I profited greatly from discussions with a fellow philosophy PhD student and dear friend, Andreas Heise. I wish to thank you for investing your time in our little study group in Bern, which alleviated some of my relative academic loneliness in Switzerland. Thank you for having so generously commented on my writings and pressed me to formulate my ideas more precisely.

My dear, brilliant friend Michele Simeon has been invaluable during this whole process. I have loved carrying on, regardless of our physical distance, our joint runs. She has always been ready to talk about the ups and downs of the life of a doctoral student. Thank you, my dearest Michele, for your friendship and all the help, both personal and academic, that you have given me over the years. I simply could not have finished this book in such good shape both physically and mentally without you.

I cannot express deeply enough my gratitude to my parents, Tuija and Matti Lukkari. You have always, unconditionally and in so many ways supported me in my philosophical endeavors. Thank you for always having been there for me! And the rest of my closest family, Juuso and Eve, Mikko and Milla, Muriel and Björn, Denise, Thomas and Andrea, Laura and Hannes, Benjamin and Rahel: thanks so much and Merci viumau for all your help, not least with the childcare during my travels and research stays.

I dedicate this book to the memory of my friend Sari Mononen who passed away unexpectedly in 2016. It breaks my heart that she was not given the time to finish her own dissertation and that I cannot share with her this moment of finally finishing mine. I am so grateful for the time we had together and the encouragement she gave me when I pondered whether to embark on this journey.

This book would not have seen the light of day without Daniel Weyermann, my love and partner in life. I cannot thank you enough for your companionship and support. You, Erik and Selma remind me every day what truly makes sense in life.

Wabern, July 2020
Hanna Lukkari

Contents

1. Introduction: Modern formalism, law and the logic of paradox

1.1 Introduction

In this work, my aim is to analyze the significance of the logical phenomenon of paradox for law. I will study a selection of formal legal and political theories, how they understand paradox in law, what implications their understanding of paradox has for law and how their chosen orientation to law as a totality of norms, communications or behaviors affects their understanding of the relationship between law and politics. I will argue that legal and political theories can be meaningfully grouped according to their orientation to legal totality and paradox, and that paradox brings out interesting differences between them. This approach allows me, on the one hand, to group theories of law and politics that in different ways acknowledge modern law's paradoxical nature and to think through the significance of this extraordinary logical phenomenon for legal operation. On the other hand, it allows me to distinguish these theories from those that regard law as a consistent, albeit incomplete, totality.

It is my hypothesis that paradoxes are not merely of theoretical interest to logicians, mathematicians and philosophers, but that they have practical, social, legal and even political dimensions, and much of our practical lives can, in fact, be understood as being confronted with paradoxes and trying to navigate our ways around or "within" them. As we will see, there are different definitions and understandings of paradox. But if we look at the concrete effects that a paradox may have, we can understand it as an indifferent difference or an inoperative distinction that suspends how the distinction normally works, which is to bring out some features of interest and leave out others. Therefore, a paradox makes the distinction thematic as such, as a distinction with two sides of which one is normally preferred to the other.

Distinctions are like tools that orient us, making it possible to, say, perceive a person as a woman rather than as a man and act accordingly (whatever that may mean for the observer in question). Much like tools that can break or go missing, impeding the continuation of what it is that we are doing with their help, our distinctions can lose their orienting force. Encountering a paradox is one such moment of disorientation and "inoperativity." However, encountering a paradox is not necessarily simply an aporia, a dead end, but also an occasion for reconsidering the direction that the praxis ought to take. Legal paradoxes are ultimately moments of the political in law, or so I will argue, because their appearance arrests the operating distinctions, putting in question the very form that orients legal practice, thereby making possible new distinctions, re-orienting the legal practice in a situation where absolutely fixed points of reference for that praxis are lacking. Paradoxes reveal the contingency of the distinctions with which law works and that constitute its identity.

Paradox has been a rather marginal research topic in legal theory. There have been discussions in legal theory both of the "analytical" and "continental" bent around such paradoxes as rule-following, exception/sovereignty and constituent power, the first two of which I introduce in the next subsection. To my knowledge, there is, however, no research attempting more systematically to map orientations to paradox in legal theory[1] and study the implications of the choice of orientation for the theory in question. It is the objective of this dissertation to fill this lack.

I have chosen to study a selection of legal and political theorists — Hans Kelsen, Niklas Luhmann, Giorgio Agamben, Alain Badiou and Hans Lindahl — in whose work paradox is either central or its significance is marginalized with theoretical techniques and choices that have significant implications for how they perceive the relation between law and politics. Other thinkers could have been selected as well, in particular Jacques Derrida, but I believe that the chosen authors represent an interesting variety of theoretical orientations to legal totality and paradox and that grouping them together for analysis allows for a fresh mapping of contemporary legal and political thought.

I have decided to label these thinkers "formalists," not because they are all conventionally referred to as such (in fact, only Kelsen, and sometimes Luhmann and Badiou, are), but because I think they all in different ways address the nature of *totality* that groups a multiplicity of entities, whether norms, individuals, communications or behaviors, together under a common banner. As we will see, paradoxes arise at the limits of totalities. Paradox poses problems precisely for formal thought, the thought that analyzes the logic of totalities. Law, if considered as a totality or form, gathers a plurality of entities under a common denominator, and when we reflect on such formalization, we encounter paradoxes. This work thus aims to contribute to a growing literature on the implications of formalism for contemporary social and political thought by providing a legal theoretical perspective hitherto missing from these discussions (see in particular Livingston, 2012; Prozorov, 2013a and 2013b).

In this introductory chapter, I will first discuss two famous paradoxes, Ludwig Wittgenstein's paradox of rule-following and Carl Schmitt's paradox of the exception/sovereign. After that, I shortly study paradox in modern formal logic and mathematics, present a definition of the paradox and discuss the notion of formalism in order to motivate the argument that there are, indeed, different possible orientations to totality and paradox with different implications for the relations between law and politics. Then, I introduce a mapping of the orientations to the nature of totality, based on the work of the logician and philosopher Paul M. Livingston, which I will use as a heuristic tool, and redefine some key concepts so that this mapping will be applicable to legal theory as well. I finish by presenting the structure of the dissertation.

[1] There are studies that analyze, for example, Niklas Luhmann's and Jacques Derrida's conceptions of paradox (Teubner, 2006; Teubner, 2001b; Kastner, 2006), as well as more general discussions of paradoxes in law (e.g. Perez & Teubner, 2006; Fletcher, 1985). Perhaps the most extensive treatment of paradox in law can be found in systems theoretical literature that we will investigate in Chapter 3.

1.2 How to follow a rule correctly and other paradoxes in legal theory

1.2.1 Wittgenstein's paradox of rule-following

Like so many people in our contemporary world, I sometimes allow myself to procrastinate by scrolling through my Facebook newsfeed. Some time ago, there appeared a sort of homemade "IQ test" that asked its readers to continue a series of simple arithmetic equations and motivated people to complete the test by claiming that "97% will fail!"

1+4=5
2+5=12
3+6=21
5+8=?

The idea was, as always in these kinds of "tests," to come up with the rule that the given set of equations supposedly implies and continue the series in accordance with this rule. Scrolling through the responses to this post showed, as expected, a variation in the proposed solution. Which of these was correct? I could easily identify two different rules implied by the calculations and hence two different responses to the last calculation, both at least seemingly equally well grounded but with different interpretations of the rule that the given equations imply: 34 and 45 (I leave it to the reader to figure out the content of the rule in each case). And there is no reason why yet other responses with different justifications could not be imagined. Yet, the whole idea of a test that "almost all would fail" certainly was that a determinate, unambiguous rule, although perhaps difficult to discover, was implied by the given calculations and that a single correct answer to the last calculation could be found on the basis of that rule.

This Facebook witticism was, probably unintentionally, recycling what is known as *Wittgenstein's paradox of rule-following*. In his *Philosophical Investigations*, Wittgenstein plays with the observation that simple sequences of numbers can be continued in different ways by variously interpreting the rule the sequences are supposed to express. He then famously concludes:

> This was our paradox: no course of action could be determined by a rule, because every course of action can be brought into accord with the rule. The answer was: if every course of action can be brought into accord with the rule, then it can also be brought into conflict with it. And so there would be neither accord nor conflict here. (Wittgenstein, 2009, § 201)

The paradox is that "'whatever I do can, on some interpretation [of the rule], be made compatible with the rule'" (Wittgenstein, 2009, § 198). The given sequence of simple equations (signs) that in my example — similar to what Wittgenstein himself discusses — were supposed to unambiguously express a determinate rule in order to solve the last equation correctly, turns out to be consistent with multiple

interpretations (meanings). It does not help to try to justify the choice of one interpretation over others with reference to yet another, higher rule, for the same problem of the undecidability of interpretation of the rule only re-emerges, *ad infinitum*. Grounds for a choice that excludes alternatives can always be questioned. If a set of signs itself is not able to control how it is continued, and if the attempt to go one level up only repeats the problem, the set allows for contradictory continuations. However, behavior as rule-following and rule-application is supposed to be about being guided by the rule *in a specific way*. A rule counts as nil if it does not discriminate among possibilities of conduct, if it cannot control how it is to be applied and followed in an open set of continuously new situations. Wittgenstein's paradox exposes the inability of the rule to control only on the basis of its past applications how it is applied and followed in a new case.

This paradox has been extensively discussed in the philosophy of language. It has been understood, for example, to challenge philosophers to clarify how "correct" language use is possible at all and how skepticism about meaningful language use can be avoided (e.g. Wright, 1980; Kripke, 1982; McDowell, 1984). Wittgenstein's paradox is understood to challenge the "natural" intuition that

> to learn the meaning of a word is to acquire an understanding that obliges us subsequently [...] to judge and speak in certain determinate ways, on pain of failure to obey the dictates of the meaning we have grasped; that we are "committed to certain patterns of linguistic usage by the meanings we attach to expressions." (McDowell, 1984, p. 325, referring to Wright, 1980.)

The paradox de-stabilizes the familiar relation between signs, whether sounds or written marks, and the meaning of these signs by suggesting that a certain set of signs is logically consistent with infinitely many meanings. How is it, then, that linguistic (and other) rules succeed at all in determining meaning in everyday life?

Saul Kripke has famously reformulated Wittgenstein's paradox as what has become known as *the Kripkenstein paradox* (Kripke 1982). Imagine a student of elementary arithmetic who has never solved equations above the value 57. Imagine also a mathematical function called "quaddition" (or the "quus" function) that is exactly like the addition function (the plus function) but with the specification that after one of the arguments reaches 57, the function's value is always 5. For example, 1 quus 1 equals 2, 35 quus 7 equals 42, 52 quus 4 equals 56, but 57 quus 3 equals 5. Now, Kripkenstein's skeptical challenge is to determine whether, in her past exercises, our student has been using the addition function rather than the quaddition function. There do not seem to be any *facts* about her past usage of the + sign that would be capable of distinguishing whether the meaning she gave to this sign was addition or quaddition. All past uses of the + below the value 57 can be made consistent with both addition and quaddition (and with an infinite number of other functions that stipulate that above 57 the value is 6 or 7 or 8...). This is not skepticism about mathematical truth, but about objectivity of meaning: how can we know what others' utterances mean, if the same set of (uses of) signs can, logically speaking, be consistent with

multiple meanings? How are communication and shared meanings possible? How do rules manage to control an endless number of new situations in certain ways rather than others? The bizarre student puts doubt on the possibility of inferring from "a given sequence of steps [...] a sort of algorithm" that we could use in order to decide how the rule determines the next step (van Roermund, 2013b, p. 544). The rule paradox demands how we can know, as Aulis Aarnio succinctly puts it, "that the rules really have been *followed*, and that they have been followed *correctly*" (Aarnio, 2011, p. 33, original emphasis).

1.2.2 The example

The relevance of the Wittgenstein/Kripkenstein paradox to the problems of the interpretation of legal norms, indeterminacy of meaning of written rules and precedents, objectivity of legal judgments and the distinction between law-making and law-application is easy enough to see. How can we understand legal judgments as rule-*applications* rather than arbitrary rule-*makings* each time around, given that, as the paradox suggests, a written or customary rule cannot itself determine how it is to be applied to a new case? Are not legal rules illusory, if contradictory outcomes, justifications for both an apology for state conduct and the utopia of world peace (to borrow Martti Koskenniemi's terms), can be derived from the same rule (see Koskenniemi, 2005)?

My intention here is not to enter these long-running, well-established debates. Let me reframe our exemplary paradox in a way relevant to our purposes. The paradox suggests, *first*, that no given set of signs, nor facts, carries its meaning within itself, but a set of signs can be, in principle, interpreted in an infinite number of ways. Meaning is not a natural, intrinsic property of signs or facts. At any moment, it is, logically speaking, possible to interpret and semantically organize a set of signs or facts in infinitely different, and thus also contradictory, ways. Nothing in the facts themselves decides whether an act constitutes, say, a treason or a liberation. This leads to the problem of *representation* that we will encounter many times in this work. *Second*, the Wittgenstein/Kripkenstein paradox points out that each choice of interpretation is contingent in the sense that it points to excluded alternatives. There is an undecidability at the heart of rules (the rule's inability to decide the next step) that leads to the problem of the justification of a choice. The argument for each and every choice can in principle be questioned by reference to the excluded alternatives. *Third*, Kripke's thought experiment of the bizarre student imagines a situation in which this undecidability leads to a standstill of successful social interaction and undermines the function of the rule, which is to exclude alternatives, by casting doubt on our ability to understand ourselves as sharing a common language. He paints a picture of the social significance of paradox: the ability of an inconsistency to undermine the continuity of social practices. However, the paradox — this is the *fourth* point — also indirectly sheds light on the drawing of contingent distinctions, holding

onto them across time, and iterating them in an open set of new situations as what enables such action and communication in the first place.

One standard interpretation of Wittgenstein's solution to the paradox of rule-following is that, first, Wittgenstein shows the impossibility of "private language," the impossibility of imagining meaningful language use without the social dimension. Second, it is the existence of "language games," and ultimately the existence of a "form of life" within which language games are embedded, that explain why language is used in meaningful and regulated, non-arbitrary ways. This has direct relevance to law as well, insofar as law is understood as something to which meaning is given in joint practices. As Aarnio, a supporter of this conventionalist view, explains:

> There cannot be language without its use, so it is not possible to talk about meanings without a language community in which the language is used. Hence, it is perfectly impossible to think that every member of the legal community could have a personal and private secondary language. For these reasons, language cannot be separated from the form of life. On the contrary, language as an activity is only meaningful when connected to the form of life that supports it. Speaking language is the same as participating in a form of life. (Aarnio, 2011, p. 37)

Here, speaking a language and correct, decidable rule-application and rule-following are only possible *within a form of life*. However, to interpret, as Aarnio does, Wittgenstein's "form of life" as "a shared cultural background" is, in fact, to beg the question. The conventionalist still needs to account for the conventions of the application of these contingent standards (Livingston, 2012, p. 140). Conventionalism is a typically "criteriological" (I come back to this term in a moment) response to inconsistency: it attempts to switch to a hierarchically higher, here "cultural," level in order to guarantee the consistency of the first level rules. When singular rules cannot by themselves determine their own correct use, are threatened by deep inconsistency, and are in that sense "incomplete," their consistency can be secured by referring the determining function to "a shared cultural background" or "the community" (see Aarnio, 2011, p. 38). The "cultural background" completes the incompleteness of the singular rule, thereby guaranteeing its consistent following and application. But if something like the "cultural background" determines the correct application and following of a rule in singular cases, how does this background *itself* come about? Given that it is quite plausible to think that contexts and "cultural backgrounds" themselves allow for a plurality of understandings, which interpretation of a cultural practice or a language game is the one that supports the correct rule-application and following in a particular case?

That a social dimension of sharing is important to understanding, following and applying rules is certainly a correct observation, but this sharing is rather the problem than the solution. What the rule paradox suggests, I would argue, is not simply the necessity of the social dimension for correct and decidable rule-following, but also the need to consider the emergence of this dimension: how is it that a community or a

form of life, within which shared meanings and reliable rules are continuously possible, is formed in the first place?

What the paradox suggests, then, is the problem of the *origin of social order*, and we come back to this problem in the following chapters from different perspectives. How is it that stable social structures emerge and stay in place over time, such that singular cases of intelligible language use and decidable rule-application and -following are possible? Let me answer this question here in a preliminary way. A stable social order makes it possible to repeat the same meaning and interpret a rule in the same way in continuously new situations. However, the relation between the singular case and the common, shared structure or form of life is not simply that of a one-way determination (see also Livingston, 2012, pp. 16-17). On the one hand, iterating the same meaning and interpreting a rule in the same way as in the past is only made possible by stable linguistic and legal structures. On the other hand, no such structure, form of life, community or order emerges and remains in place over time without the singular acts that *repeatedly exemplify or are taken to represent it*. The singular case of correct language usage or rule-application is dependent on the existing structure that determines it, but, inversely, the structure is also dependent on the singular case that exemplifies it.

Each singular case of correct rule-application and rule-following must then claim to iterate a distinction that has already been made between alternative interpretations of the rule. It must present itself as *an example* of how one correctly applies and follows a rule in general, in exclusion to alternative, incorrect possibilities of its application and following. What the bizarre student in the Kripkenstein paradox precisely challenges us to do is describe the *normal* student of mathematics as *paradigmatic* or *exemplary one*: as someone whose behavior manifests how the whole practice of counting ought to unfold.

By challenging us to explain how one ought to use the addition sign, deviant behavior points to the particular logical place that the example occupies. As Giorgio Agamben notes, an example or a paradigmatic case of rule-application or -following is a singular entity that is, first of all, "deactivated from its normal use" (Agamben, 2009, p. 18). As Kripkenstein illustrates, encountering a threatening inconsistency in a social practice puts on hold how that practice usually unfolds, deactivates it and makes thematic, or at least presents a challenge to thematize, the characteristics of exemplary behavior. The exemplary case thus, in Agamben's words, "present[s] the canon — the rule — of that use" (Agamben, 2009, p. 18). It represents the set of correct uses of a rule as a whole. Furthermore, that a singular case claims exemplarity in how one applies or follows the rule correctly in general means that it must present itself as repeatable in future cases. An example that could not be repeated — shared by many who orient themselves according to the example — would not be an example.

However, it remains a possibility that a distinction among alternatives that the example represents is, simply, dropped and not iterated. So, the meaning of a singular case as exemplary of the set of cases of correct rule-application or -following depends, in fact, on its *becoming confirmed* by other singularities that repeat its choice of distinction. Each singular case that claims exemplarity remains just that, *a claim* to

exemplarity requiring confirmation by other singular cases that repeat its choice. Thus, legal structure or "legal form of life" as the set of all correct uses of a rule is not simply a static background determining the singular cases. If the singular case owes its meaning as a correct application or following of a rule to the form of life, it is also the case that this form of life owes its appearance to the singular case that claims to exemplify it, opening the possibility for other singular cases to do the same (or not). Rules of rule usage, Agamben argues, "cannot be shown in any other way" (Agamben, 2009, p. 18) than through the singular exemplar that itself depends on other singular cases for its (continued) exemplarity. We return later to this paradoxical temporality of the example/representation on several occasions.

Bert van Roermund has argued in response to Wittgenstein's paradox that rule-following can be understood as the subject's relating to rules as *icons*:

> To follow, indeed to interpret, a rule is not to apply a syllogism or an algorithm to the situation, but to step through the looking glass, i.e., *to project oneself as a would-be agent in front of the rule, to a form of behaviour from the perspective which the rule is prompting*. In order to "interpret" the rule, there is a need to relate your standpoint to the point where the rule situates you, and this again is conveyed by a function that involves taking that step in order to yield a picture that strikes you as "coherent." In navigation we do this all the time: Your GPS device tells you where you should go, but only on condition (a) that your map is oriented, and (b) that you are prepared to project yourself on to that tiny triangle on the display. (van Roermund, 2013b, pp. 549-550, my emphasis.)

A rule "prompts a perspective" for orienting oneself in the world and toward others, and following a rule is about situating oneself to that perspective for orientation offered by the rule. I would add to this that such situating-oneself-to-the-perspective-prompted-by-a-rule is precisely about iterating a rule, confirming that this situating exemplifies, in its singularity, the totality of cases of correct rule-following as situating-oneself-to-the-rule's-perspective. If a rule is to function as an icon that proposes (demands) the taking-of-a-perspective, some singular case of its application or following must exemplify that perspective. Mere naming the rule on paper cannot achieve this. A singular case of rule-following (like the behavior of some student that appears as normal, or indeed my own) must claim to exemplify "a form of behavior" and a perspective that ought to be shared by all those that the rule addresses. A singular case, and the particular perspective of orienting oneself in the world and toward others it proposes, may be a "true" example of that shared orientation, but this depends crucially on whether others recognize it as "their own" perspective or not. Thus, a "form of life" is, in fact, about a "formalization of life": not a static order but rather a temporally unfolding process of ordering as the iteration of a perspective of the world and toward others that a rule is interpreted to demand.

Note that understanding the rule-following inconsistency in this way does not, in fact, efface the paradox, but rather turns it into another one. For examples are,

logically speaking, exceptions to the law of the excluded middle (either *P* or *not-P*, but not both) (Livingston, 2012, p. 140). This is because on the one hand, a singular case that functions as an example is just one case among other similar ones. On the other, it is not just any case, but the case that manifests what all these cases share, what joins them together. It "occup[ies] the elevated and exceptional position of the general" (Livingston, 2012, p. 140). The Finnish word *laki* means "law" in its normal use, but it can also exemplify the declination of substantives in Finnish (laki, lain, laissa, laista, lakiin etc.), in which case the word's usual signifying function is momentarily suspended, so that the word is able to represent the general law of declination (see Agamben, 2009, p. 24). An example, thus, is neither mere singularity nor mere generality, but a point of their crossing. It is *a singular point at which the internal logic of a totality is shown*. An individual case that is considered to be an example of something therefore paradoxically both belongs to and is excluded from the set of cases it exemplifies. An exemplary student is not simply one student among others but the *normal or paradigmatic* student: she is a student whose behavior "shows the law of behavior" for other students as well and shows where the bizarre student goes wrong. For this reason, because she makes visible the norm for being a good student, she is unlike all other students.

So, while our original paradox of the inability of a rule to determine its own application and following leads to what logicians call "explosion" — every behavior could equally well count as applying or following a rule — the paradoxical logic of an example, by contrast, shows how rule-application and -following is possible in the first place. Below we encounter a position in contemporary logic that accepts some inconsistencies as true paradoxes, that is, as inconsistencies that reveal something important about the nature and logic of totalities themselves. We will also come back to study the significance of exemplarity for law; for now, suffice it to note that the above interpretation of Wittgenstein's form of life itself exemplifies a position that I will call (following Livingston) the "paradoxico-critical" orientation to paradox. A reformulated paradox of rule-following may well be a version of true paradox.

1.2.3 The exception

That the rules of rule usage can be shown only through the singular exemplars (or this is at least what a paradoxico-critical position holds) has a formal structure that is very close to another paradox well known in political and legal theory, that of *exception*. In an exception, the law applies to the case at hand in no longer applying, that is, the effectivity of the law to regulate the case at hand is suspended, although the legal order as a whole stays in place. Both the exemplary case and the exceptional case stand both inside and outside the legal order. The example that shows the rule of the rule usage is, in fact, itself an exception, to the extent that in order to be able to show or make manifest what the correct use of the rule is, it must be "deactivated from its normal use," as Agamben puts it (Agamben, 2009, p. 18). As mentioned, a singular

case of rule application exemplifies how that rule ought to be applied only if that application is not just blind, unreflective of itself, but somehow points to itself, makes its own operation thematic. While the example precisely seeks to guide behavior according to the rule and show how to make the correct decision among its possible interpretations, the legal exception suspends the exemplar force of the normal and gives space to another behavior, incongruent to the normal rule. At least since Carl Schmitt's writings on the nature of sovereignty, that "another behavior" has been understood as the purely political, legally ungrounded decision.[2]

Making essentially the same point as Wittgenstein with his paradox, Schmitt notes that "no norm, neither a higher nor a lower one, interprets and applies, protects or guards itself" (Schmitt, 2004, p. 54): it is the very relation between life and the legal form of that life that the norm itself is unable to establish. "For a legal order to make sense," Schmitt (in)famously writes, "a normal situation must exist, and he is sovereign who definitely decides whether this normal situation actually exists" (Schmitt, 2005, p. 13). Liberal political and legal theory *presupposes* that normal situation, thereby obscuring the very non-legal foundations of the legal order: the decision that a normal situation actually exists (Schmitt, 2005, p. 13; Whyte, 2013, p. 56). For liberalism, "the decision has already been made, and that decision dictates that there will be no more decisions," only norms (Rasch, 2007, pp. 95-96). For Schmitt, it is the legally unbound sovereign that determines the relation between norm and life: "authority proves that to produce law it need not be based on law" (Schmitt, 2005, p. 13). As a mirror image to the inability of a norm to guarantee its own application, the state of emergency is a factual situation that the norm cannot anticipate (Schmitt, 2005, pp. 6-7). Whether there is a state of emergency requiring the suspension of the law to the benefit of the maintenance of the state and public order, and what needs to be done in such a situation, are normatively underdetermined. Only an extra-legal, and in this sense unlimited and absolute, decision on the exception/the normal is capable of making law *an order*, a concrete order in exclusion to alternative ones (Rasch, 2007, p. 96).

Schmitt's orientation to paradox also comes close to "criteriological" orientation: for Schmitt, the legal order is fundamentally incomplete, incapable of grasping its own limits and grounding its own authority, thereby necessitating the *purely* non-legal decision to draw limits on law's behalf and from a privileged outside position. The paradox of law seeking to limit itself, to ground its own authority, must be solved "existentially," by the sovereign state.

> The existence of the state is undoubted proof of its superiority over the validity of the legal norm. The decision frees itself from all normative ties and becomes in the true sense absolute. [...] The two elements of the concept *legal order* are then dissolved into independent notions and thereby testify to their conceptual independence. (Schmitt, 2005, p. 12)

[2] I discuss both the example and the exception further, with references to literature, in Chapters 4 and 6.

By dividing the legal order into law and "existential" political order, and allocating superiority to politics, Schmitt, it seems to me, prefers to see law as "completed" by the extra-legal rather than as inconsistent, as paradoxically self-authorizing and self-ordering all the way through. The irony is that this choice is exactly the same as that of Schmitt's theoretical nemesis, Hans Kelsen. Kelsen, as we will see in Chapter 2, also chooses (at least when read conventionally) incompleteness over inconsistency and switches to a higher level in his dealing with the paradox of law's self-founding, although for him this metalevel is legal science, not the political existence of the state. In tracing their very different theories of the relationship between law and politics to a common choice between an incomplete totality and an inconsistent totality, we can ask what kind of implications does an alternative choice, that of preferring the inconsistent totality, has for our understanding of law and politics.

Since Schmitt, the formal figure of the exception has been a central problem in political and legal theory. The oscillation between the political and the legal that the figure of the sovereign implies has been addressed by many prominent thinkers (e.g. Agamben, 2005a; Arendt, 2017; Benjamin, 1968; Benjamin, 1986; Butler, 2004; Derrida, 2005; Honig, 2009; Honig, 2007). The paradox has also been understood in a democratic key, in terms of *constituent* and *constituted power*, and it can be formulated as follows. On the one hand, constituted power (political and legal institutions) is incapable of consistently guaranteeing its own authority, which seems to make necessary a reference to constituent power ("the people") as the ultimate ground of political and legal institutions. On the other hand, constituent power, "the will of the people," presumably something irreducible to the institutional, only finds its expression when mediated by institutions. Attempts are multiple to solve the paradox by preferring either of the poles, the constituent side or the constituted side, the people or the law. In order to avoid making this introductory chapter overly long, I will postpone the discussion of this formulation of paradox and distribute it among different chapters (2, 4, 5 and 6).

The phenomenon of paradox is thus well-known in legal and political theory. What seems to me to be less well recognized is that in the background of various conceptions of legal authority and the relation between law and politics lie different *metalogical choices* (I come to this notion in a moment) of interpreting the meaning of paradox. This dissertation is motivated by the belief that it is a worthwhile endeavor to map more systematically than has been done before 1. the metalogical choices in the interpretation of paradox in law that have been made by important legal and political formalists and 2. the implications that those orientations to paradox have for their respective understandings of legal authority and the relationship between law and politics. Often (too often) the paradox of exception has been reduced to play, as a "state of emergency," the role of a paradigm of contemporary global politics. This is not, however, the only possible lesson to draw from this paradox and its implications for politics. In order for us to understand how and in which ways we can be "released" from following law, it is certainly important to understand how it is that law claims to form our lives in the first place. Considering more carefully different understandings

of legal and political formalism and their orientations to paradox might help to nuance the implications that paradoxes can be seen to have for our contemporary political situation.

Thus, I propose to draw on the recent work by Paul M. Livingston (2012) on the *metalogical choice between incomplete and inconsistent totalities* in the interpretation of paradoxes in order to show how different choices lead to different conceptions of the structure and significance of "forms" for social, legal and political life. To get a clear understanding of the "metalogical choice," we need to take a short look at formal logic and interpretative positions to paradox within that field. Before doing that, one final note on the notion of formalism. In line with Livingston who also studies the consequences of formalism for political thought, I think that Wittgenstein and his followers in legal theory point to a significant expansion of the notion of *legal formalism*. Following their example, legal formalism of "the legal form of life" is not the specific theoretical position according to which judges decide cases rather mechanically on grounds of pre-given norms, nor is it reducible to Kelsenian formalism. In the general sense that I adopt here, *legal formalism* is the notion that law can be understood as a form that captures a plurality of entities (norms, facts, behaviors or individuals) within a totality, gathers, or rather *claims to* gather, these together into a unity. Law orders the many into one, and thus presents a claim to a "formalization of life." The emergence and significant implications of paradoxes in formal logic and mathematics of the twentieth century that we will take a look at next suggest, in turn, that legal formalism and formalization will also be affected by paradoxes and inconsistencies that the metalogical study of forms or totalities has discovered.

1.3 Paradox in modern logic and mathematics

1.3.1 Paradox and formalism

What, formally speaking, is a paradox? In philosophy, the term paradox has been defined, for example, as a "set of propositions that are individually plausible but collectively inconsistent" (Rescher, 2001, p. xxi) and as "an apparently unacceptable conclusion derived by apparently acceptable reasoning from apparently acceptable premises" (Sainsbury, 1995, p. 1; see also Perez, 2006, p. 5). Logical paradoxes have been seen as properties of (sets of) sentences, like in the classic case of Epimenides' paradox (also known as the Liar paradox). "All Cretans are liars," says Epimenides, a Cretan, seemingly implying that what he says is a lie. But is it? It seems that if it is untrue, then it is true, for that is what he is saying, and if it is true, then it is untrue, for the sentence is a lie. The paradox arises from the sentence's applying the distinction true/untrue to itself, while already making use of this same distinction. The sentence, by a Cretan, says something about what all Cretans say, hence including itself in the

scope of what it is talking about and attempts to apply the distinction true/untrue to both the saying and what is said. Law is not reducible to language and sentences, so legal paradoxes are not simply properties of sentences nor do they exactly arise from (potentially false) reasoning from known premises (Perez, 2006, p. 13). They do arise, however, from the problematic relation between *totality* and *self-reference*. A more exciting formal definition of paradox, one applicable to law as well, than the one given above uses this insight, as we will see in a moment.

The etymology of the word *paradox* is rooted in the Greek noun *paradoxon*, which is a combination of the preposition *para-*, which means "contrary to" or "against," and the noun *doxa*, "belief, opinion." *Doxa* has its roots in the verb *dokein*, "to appear, seem, think." A paradox thus goes "against the belief." It appears as something contrary to what one would think and expect. If *orthodox* means the "straight" or "right" belief, a paradox is "the other belief" (Philippopoulos-Mihalopoulos, 2009, p. 61). A paradox "initiates the other speech, the other speaking, their expressing a belief contrary to the belief of their interlocutor. This contrary belief, however, is equally valid, with the result that the discussion returns to itself without ever concluding anywhere" (Philippopoulos-Mihalopoulos, 2009, p. 61). Thus a paradox violates the interdiction of contradiction (not both P and non-P), and logicians have typically been at pains to explain paradoxes away and maintain the orthodoxy. As Willard V. Quine expresses this reaction in the following way: a paradox "produces a self-contradiction by accepted ways of reasoning. It establishes that some tacit and trusted pattern of reasoning must be made explicit and henceforward be avoided or revised" (Quine, 1976, p. 5). Before those whose faith went against the doctrine of the Church received the name "heretics" (from the Greek *hairetikos*, "able to choose"), they were in fact called "paradoxes" (Segal, 1988, p. 80). Like the heretics whose "ability to choose" the Church precisely denied, the phenomenon of paradox is something that philosophy and legal thinking have traditionally not tolerated.

Within contemporary logic there are different views as to the importance of paradoxes. Some hold on to the traditional view that paradoxes are only curiosities with marginal significance. At the other extreme, some logicians defend "dialethism," a reworked logic that at some defined occasions tolerates the presence of paradoxes and the inconsistency they imply (see e.g. Priest, 2006). Whatever the judgment concerning the centrality of paradoxes in logic, it is nevertheless the case that important strands in modern logic and analytic philosophy of language, that is, in the study of the structure and limits of (formal) language(s), have been significantly shaped as a result of the discovery of paradoxes. Paradoxes have emerged in the thinking through of the logic, and the metalogic, of forms and totalities.

Set theory is the branch of mathematical logic that studies forms as collections of mathematical objects. Simply put, set theory is the study of the logic of the creation of totalities that group together a plurality of elements. Georg Cantor, the creator of set theory, defined the notion of totality as follows:

> By a 'manifold' or 'set' I understand in general any many [*Viele*] which can be thought of as one [*Eines*], that is, every totality of definite elements which can

be united to a whole through a law. (Cantor 1980, p. 204, footnote 1, quoted in English in Livingston, 2012, p. 4.)

The logic of conceiving the many as one, united by a law: this is the core idea of modern formalism as I apply it here. It is in studying the logic of totalities that paradoxes and inconsistencies are encountered and the need to choose a position toward them emerges. Formal thinking in its basic mode of comprehending *the many as one* is by no means limited to mathematical logic or set theory but characterizes all conceptual thinking as a grasping of singularities under general concepts. Also, non-mathematical and non-technical concepts and general terms that relate objects and singularities to some determinate predicate or general term pose questions concerning the relationship between the One and the Many that are formally speaking the same as in logic, and thus are also prone to encounter paradoxes.

"[T]he operation of grouping or collecting individuals under universal concepts or general names can [...] be taken to be the fundamental operation of linguistic reference," argues Livingston, and just like for mathematical logic, "the paradox has important consequences for thinking about language and representation as well" (Livingston, 2012, p. 23). Livingston defines the notion of *form* as "the ('structural' or 'operational') basis of *any* grouping of (finitely or infinitely) many as one. This extends [...] to the unity of a technique or practice, understood as the unity of the determination of a set of empirical instances by a rule or law" (Livingston, 2012, p. 4, footnote 6). *Formalization* can then be thought of as any activity of reflecting on forms, their structure, limits and emergence, producing *formalisms* that in different kinds of languages capture the rules of forms they define.

Defined in such wide terms, the notions of form, formalization and formalism are not restricted to "formal languages" such as mathematical ones, but can rather be seen to be operative in all forms of conceptual thought and discursive practice — legal ones included. "Forms" come into play whenever "something appears as something," as phenomenologists would say, that is, whenever something, an object or entity, is spoken, categorized, thought, seen, understood, judged, interpreted to be *as* something meaningful or having a property, thereby grouped together with all other instances of that meaning or property. Formalization as a reflection of such grasping-the-many-as-one can thus be seen as a perfectly ordinary operation not limited to formal sciences.

An important consequence of such a wide definition of formalism is that social, legal and political thought now fall within it. Livingston argues that "collective life can be theoretically reflected in formal-symbolic theoretical structures and [...] such structures can illuminate the lived forms of community and social/political association" (Livingston, 2012, p. 4). Indeed, what is "a collective," "legal order" or "social whole" other than a plurality of members (for example individuals, norms, groups and communications) "counted as one," grouped together under some conception, rather than another, of what unites them? This also suggests that "legal formalism" is not to be reduced to a conception of mechanical solving of legal cases, but has much more general, and important, a meaning as a conception of how a

plurality (of comportments, norms, communications) becomes grouped under a totality (a legal collective, a legal order or system).

1.3.2 The logic of paradox

Let me note that my intention in this work is not to explicitly argue for any strict homologies between legal and mathematical forms (we will see an exception to this in the case of Badiou). However, if the wide definition of the notions of form, formalization and formalism is plausible, and I think it is, this suggests that it bears at least heuristic value for legal theory to shortly look at some paradoxes in logic and their (arguably) common structure. This will help to draw out some features (totality and self-reference; limits of thought; forcing a reconsideration of usual principles of logic) that are of importance for legal and political theory as well. Paradoxes have been one of those points in logic that has forced the whole enterprise to reconsider its basic assumptions, to reflect on its own structures and limits. My hypothesis is that paradoxes will do the same for legal theory and the operation of law itself.

Let us begin with set-theoretical paradoxes. What is known as "Cantor's theorem" states that every set can be divided into more subsets than it has members. The set of cows — to choose an example from Quine's famous essay "Ways of Paradox" — has more subsets of cows than it has cows (Quine, 1976, p. 14). The set of all cows can be divided into the subsets of all cows that are brown and white, all cows that are brown, all cows that are black, all cows that are black and white, all brown and white cows, all black and white cows etc. Cantor showed that the *power set*, the set of all subsets of a set, is necessarily larger in size than the set itself. (In Chapter 5, we will see that Badiou makes a lot of this notion as well as of the closely related theorem of the point of excess, which says that in every power set, there is an element not presented in the original set (Baki, 2015, p. 129).)

Cantor's theorem becomes mind-boggling when the set under consideration is infinite. The set of all natural numbers is an example of an infinite set. Cantor defined such a set as countably infinite: there is no highest natural number, but each number has a successor, as it is always possible to count up one number. Furthermore, any set that can be put into one-to-one correspondence with a countably infinite set, is also countably infinite. For example, the set of even numbers (that is, only the "half" of natural numbers) can also be shown to be countably infinite by putting the two sets into one-to-one correspondence (1→2, 2→4, 3→6 etc. *ad infinitum*). As long as the members of two sets can be paired off by pairing their members with each other, they are said to have the same size (or "cardinality"). Now, Cantor proved that there is also *un*countably infinite sets that are "bigger" in size than countably infinite sets. He used indirect proof (*reductio ad absurdum*) and a technique called *diagonalization* to argue that the set of real numbers is bigger than the set of countable numbers. Attempting, for the sake of the argument, to map a listing of each real number between 0 and 1 to a one-to-one correspondence with the list of all counting numbers fails and

necessarily ends up missing a real number. Real numbers, Cantor concluded, are uncountably infinite and "bigger" than countably infinite numbers, and thus infinities come in different sizes.

Diagonalization argument, or the diagonal method, receives its name from the proof's topological nature. First, Cantor set out a table of real numbers between 0 and 1, matching each of them one-to-one with a natural number, and then, picking up numbers along the descending diagonal of the table on the side of the real numbers, he produced a real number between 0 and 1 not already noted in the table. That number "on the diagonal" shows the impossibility of one-to-one correspondence and the uncountable infinity of real numbers. The diagonalization technique essential to this result constructs an element that is *formally a member of* the list (i.e. a real number) but *demonstrably not* the same as any member already *on* the list (Livingston, 2012, p. 21). Diagonalization is a technical name for the paradoxical logic that we already discovered in our discussions of the example and the exception: given a set of, say, all students of mathematics or applications of a rule, the diagonalization articulates a member of this set that it simultaneously demonstrates not to belong to this set (because this member either exemplifies the set as its paradigmatic member or functions as the "sovereign" who decides whether the set of rules is in force).

This same technique that "extracts" from a totality an element that both belongs and does not belong to it, is also behind the power set theorem (that there are more classes of cows than there are cows). It gives the theorem, in Quine's words, "[a] distinct air of paradox" (Quine, 1976, p. 14). To continue Quine's example:

> no correlation of cow classes to cows accommodates all the cow classes. The proof [via diagonalization; HL] is as follows. Suppose a correlation of cow classes to cows. It can be any arbitrary correlation; a cow may or may not belong to the class correlated with her. Now consider the cows, if any, that do not belong to the classes correlated with them. These cows themselves form a cow class, empty or not. And it is a cow class that is not correlated with any cow. If the class were so correlated, that cow would have to belong to the class if and only if she did not. (Quine, 1976, p. 14)

Considering the *non*-membership of cows to classes of cows *itself* forms a cow class not already listed — a cow class that cannot be correlated with any cow! If it were so correlated, then the cow would paradoxically have to both be a member and not be a member of it. The attempt to build a one-to-one correspondence between a set and its power set thus is *inconsistent*.

> Given certain assumptions about the nature of properties (or predicates, attributes, universals, etc.), [the diagonalization method] establishes that the number of properties applicable (or not) to a certain logical kind of thing must always exceed the number of things of that kind. If we [seek to map] the things of the kind in question [... to the] properties applicable to them, and view the [corresponding one-to-one mapping] as indicating which things instantiate

> which properties, we are prompted to ask whether or not there is such a property as not instantiating the corresponding property in the mapping. If so, it should be included in the mapping, but then the object that corresponds to it instantiates it if and only if it does not. (Klement, 2010, p. 18)

As we saw with Wittgenstein, facts or signs can be mapped to meanings in contradictory ways. We can understand the diagonalization to establish an excess of representation over the thing represented: representation, predicating something of something, is never simply reducible to the something it represents, but it produces a surplus. The inconsistency and paradox that we encounter when we ask about the relation of the thing not represented to representation is what makes the excess manifest.

If the power set of an already infinite set is necessarily bigger than the set itself, what about *the universal set*, the set of all possible (infinite and finite) sets? Can we consistently think of such a thing? This was the question that lead Bertrand Russell to discover the paradox that goes by his name. At first sight, it seems that the universal set does not have more subsets than it has members, for all its subsets are its members. But we can see the inconsistency of this idea by using diagonalization. The reasoning is essentially the same as in the cow example. The universal set must contain self-membered sets (like itself) but also non-self-membered sets (trivially, the set of criminal laws and that of cows that are themselves neither laws nor cows). We then ask whether the set of all these non-self-membered sets is a member of itself, whether it has the property that constructs it — and end up in a paradox. For, as with the cows, if that set were a member of itself, then it must have the predicate of not being a member of itself, and thus it would not be a member of itself; however, if it were not a member of itself, then it would have the right predicate and be a member of itself. The set would belong to itself if and only if it did not. The attempt to build a set of all possible sets results in inconsistency.

Russell noted that the formal set theoretical paradox had affinities with Epimenides' semantic paradox (Livingston, 2012, pp. 23-24). In both of these contradictions, says Russell, "something is said about *all* cases of some kind, and from what is said a new case seems to be generated, which both is and is not of the same kind as the cases of which *all* were concerned in what was said" (Russell, 2004, p. 61, quoted in Livingston, 2012, p. 24, emphasis in the original). Whereas an assertion about the deceptive properties of all Cretans by a Cretan makes the assertion oscillate between truth and untruth, grouping together *all* sets by using the rule of non-self-membership allows for the possibility to iterate this rule and create the paradoxical case of the set that seems to both belong and not belong to itself. It thus seems that paradoxes emerge *when an attempt is made to delimit a totality*: first one seeks to pin down the rule for the formation of the totality, but then, if one thinks further "along the diagonal," a new case emerges that seems to both belong to the scope of the totality's formative rule and not belong to it.

The Austrian mathematician Kurt Gödel is another famous figure in thinking through the difficulties of the logic of totality, and his formulations will also be

important for this work. In "On Formally Undecidable Propositions of *Principia Mathematica* and Related Systems" (1931), Gödel showed that formal, axiomatic systems that are sufficiently complex to model basic arithmetic are necessarily undecidable, which he understood to mean that they are incomplete and incapable of proving their own consistency. Gödel's theorems put into question the basic assumptions of arithmetic on which Russell's and Alfred North Whitehead's *Principia Mathematica* relied. The core assumption of *Principia* was that arithmetic systems are both consistent and complete. *Consistency* means that such systems are free from contradiction, that in them no correctly formed statement of the language of the system and its negation are both deducible, that is, provable as true. The *completeness* of a system means that any correctly formed statement of the language of the system, or its negation, is "decidable" in it, that is, can be proven true. The axioms of that system are assumed to contain enough information to allow the truth value of every arithmetical sentence to be deduced by using the regular rules of inference. The truth of a sentence formulated in the language of the system is equated with provability in the system (or it is a matter of simple analytic definitional truth), and everything a sound axiomatic system proves must be true (Gödel, 2004, pp. 5-6; Smith, 2013, pp. 1-3).

Gödel's so-called first incompleteness theorem states that formal, consistent systems complex enough to axiomatize arithmetic have a sentence that can somehow be recognized as true but that nevertheless is undecidable, unprovable in that system. Very roughly and informally, Gödel's great innovation was to construct a mathematical coding, called Gödel numbering, that allows an arithmetic meta-calculus to speak about arithmetic first-order calculus. This coding allows arithmetic to refer to itself, to substitute both numbers and statements about numbers for Gödel numbers. With this coding, Gödel found a way to arithmetize the syntax of the arithmetic language in question, to represent the system's structure of proof within itself. He created a metalanguage the statements of which have meaning both at the metalevel and, as they remain de-codable, at the "original" level. Gödel then produced, by using the technique of diagonalization, *a sentence that encodes the claim that it itself is unprovable in that system*. The sentence both is a sentence produced in the language of the system just like any other and demonstrably unlike any of its other sentences (as it says of itself that it is unprovable) (Gödel, 2004; Smith 2013, pp. 3–4, 136; Raatikainen, 2018; Livingston, 2012, p. 21).

Informal reasoning for the truth of the Gödel sentence can depart from the assumption of the soundness of the system (that is, the system cannot prove a false sentence). If the system were to prove that sentence, then the sentence would be false, and given the assumption, this cannot be the case. So, the c of the Gödel sentence must be true, and its negation false. But the falsity of its negation must also be unprovable, as the system proves only truths. Hence the sentence is true and the system incomplete. The reasoning can also depart from the assumption of the consistency of the system (that is, the system cannot prove both a sentence and its negation true). Using *reductio ad absurdum*, suppose the claim "this sentence is unprovable" is false; then it is false that it cannot be proved. Then it is true that the sentence "this sentence

is unprovable" can be proved; but a proof of it would then also be a proof that it cannot be proved (as this is what it says). Thus, we have a contradiction on the assumption that the claim asserted by the Gödel sentence is false. Therefore, on pain of contradiction, the Gödel sentence must be true, and yet unprovable (as this is what it says). Gödel understood this result to show that consistent, non-paradoxical mathematical systems contain truths that they cannot "decide" and are therefore incomplete. The second Gödel theorem then states that no consistent mathematical system can prove its own consistency, or in other words, formal systems have to presuppose their own consistency, their consistency is an independent truth and they are incomplete in this sense (Smith, 2013, pp. 3-4; Raatikainen, 2018; Livingston, 2012, p. 25).

The undecidability of the Gödel sentence arises, because the sentence is a point at which the system becomes self-referential by using both first and second order language. "Gödel's theorem shows that there can always be propositions that signify in language and metalanguage simultaneously and that they can be constructed to signify at cross-purpose," as one commentator explains (Thomas, 1995, p. 251). Another commentator notes that "[w]hat is strange about [Gödel's theorem] is that the theorem is itself set out and proved by means of a highly complex and extended formal-logical sequence of argument which cannot but depend upon just those resources that it shows to fall short of such probative warrant or ultimate demonstrative force" (Norris, 2012, p. 98). Quine, for his part, calls Gödel's theorem "a latter-day paradox that is by no means an antinomy [like the Epimenide's/Liar or Russell's paradox] [...], and yet is comparable to the antinomies in the pattern of its proof, in the surprisingness of the result and even in its capacity to precipitate a crisis" (Quine, 1976, p. 16).

The theorem is not always understood to be a paradox (Smith, 2013, p. 4), or it is defined, as by Quine, as a "veridical paradox" that cannot be deactivated by revising the guilty principles and rules, unlike in the case of "antinomies" under which Quine counts the Liar and Russell's paradox (Quine, 1976, p. 17). Between the Liar and the Gödel theorem there is indeed at least the difference that, whereas in the Liar, when constructed in the form "This sentence is false," the sentence refers to itself *directly* via the use of the deictic expression "this," the Gödel sentence refers to itself *indirectly*. The indirectness is due to the diagonalization technique, in which self-reference can be understood in terms of naming and quotation instead of deixis. Quine, however, shows how the Liar can also be understood to involve indirect self-reference. The Liar paradox expressed with indirect self-reference is as follows:

> "'Yields a falsehood when appended to its own quotation' yields a falsehood when appended to its own quotation." This sentence specifies a string of nine words and says of this string that if you put it down twice, with quotation marks around the first of the two occurrences, the result is false. But that result is the very sentence that is doing the telling. The sentence is true if and only if it is false, and we have our antinomy. (Quine, 1976, p. 7)

Then the Gödel theorem in terms of quotation:

> For "falsehood" read "non-theorem," thus: "'Yields a non-theorem when appended to its own quotation' yields a non-theorem when appended to its own quotation." This statement no longer presents an antinomy, because it no longer says of itself that it is false. What it does say of itself is that it is not a theorem (of some deductive theory that I have not yet specified). If it is true, here is one truth that that deductive theory, whatever it is, fails to include as a theorem. If the statement is false, it is a theorem, in which event that deductive theory has a false theorem and so is discredited [as inconsistent]. (Quine, 1976, p. 17)

The operation of quotation achieves formulation of a sentence that both belongs to the theory, as it is correctly formulated by the rules that the theory provides, and does not belong to it, as the theory cannot prove it.

It has also often been noted that Gödel's theorem and Russell's paradox have a similar overall structure. Livingston pinpoints this similarity as follows: "[t]he problematic element, in both cases, reflexively captures the total structure of the *whole* system (the universe of sets, or the formal system under consideration), of which it is a part, at a fixed, local point *within* that very system" (Livingston, 2012, p. 25). The logician Graham Priest has, in a remarkable study of paradoxes across the history of philosophy from Plato and Aristotle to Kant and Hegel up to contemporary logical formalism and continental philosophy, formalized the common structure of these paradoxes. Although Gödel's theorem, Cantor's theorem, the Liar and Russell's paradoxes all have different formal implications in logic and mathematics, a general structure can readily be seen, or this is at least what Priest argues. He calls them *limit-paradoxes*, because they emerge at the boundaries of totalities. "Limits of [what can be expressed, described, known, or the limit of iteration of an operation] provide boundaries beyond which certain conceptual processes (describing, knowing, iterating, etc.) cannot go; a sort of conceptual *ne plus ultra*." His thesis is then:

> that such limits are dialetheic; that is, that they are the subject, or locus, of true contradictions. The contradiction, in each case, is simply to the effect that the conceptual processes in question *do* cross these boundaries. Thus, the limits of thought are boundaries which cannot be crossed, but yet which are crossed. (Priest, 2002, p. 3)

According to Priest, it is always possible to generate a formal limit-paradox when two conditions are fulfilled. The first is *closure*, the formalization of the necessary conditions for membership in a given totality. Closure is about giving the formative rule of the totality in question, drawing its boundaries and setting it apart from other possible totalities. The second condition is *transcendence*, an operation, paradigmatically diagonalization (but also an everyday operation, such as the formulation of an example), that, given a totality, is able to generate an element that

is outside this totality. "This construction," Priest explains, "is precisely a boundary-tearing heuristic which, given any boundary of a suitable kind, can be applied to violate it" (Priest, 2002, p. 4). If an element satisfies both of these conditions, it falls both inside and outside the totality. This is, Priest argues, simply a formal way of putting the difficulties which philosophers have encountered in their attempts at comprehending the limits of the totality of thought to which their very act of comprehension belongs. Trying to grasp the limits of thought is essentially an inconsistent operation that attests to this paradoxical topology of closure and transcendence that Priest calls *inclosure* (Priest, 2002, pp. 3-4, 147; Livingston, 2012, pp. 32-33).

1.3.3 The metalogical choice

A paradox in the logical sense is, thus, an argument that begins with known principles concerning truth and membership, for example, and proceeds with valid reasoning to a conclusion that has the form A and non-A. All paradoxes that we have shortly described emerge from a totality as if bending over itself, like a Möbius strip, to refer to itself; they form a point that "exists" at two, intertwined levels, so to speak, that are in contradiction with each other. By using another metaphor, one could say that a paradox punctures a totality that was thought to be complete, and, by constructing an element that does not belong to the totality, and yet is not simply irrelevant to it, shows the totality to be other than it is. For logicians like Priest,

> *[p]rima facie*, [paradoxes] show the existence of dialetheias [true contradictions; HL]. Those who would deny dialetheism have to show what is wrong with the arguments—of every single argument, that is. For every single argument they must locate a premise that is untrue, or a step that is invalid. Of course, choosing a point at which to break each argument is not difficult: we can just choose one at random. The problem is to justify the choice. (Priest, 2006, p. 9)

Indeed, formalists and logicians have traditionally not tolerated the presence of paradoxes and they have not seen their contradictions as true. Quine distinguishes between *falsidical paradoxes* (like Zeno's paradox of motion) that can be solved by simply pointing out the fallacy involved, *antinomies* that "establis[h] that some tacit and trusted pattern of reasoning must be made explicit and be henceforward avoided or revised," therefore requiring "a repudiation of part of our conceptual heritage," and *veridical paradoxes* that "we can get used to, thereby gradually sapping its quality of paradox" (Quine, 1976, pp. 3, 5, 17).

What Quine calls an antinomy signals a perplexing and disorienting complexity that threatens what is held to be true and right. It blurs the simplicity of a binary value as a mere opposition (true/false, member/non-member) in its assertion that both

sides of the opposition are valid, or that no informed choice between them can be made. Suddenly the familiar distinctions do not work as we would expect them to. Sometimes the term *aporia* is used synonymously with paradox: *áporos* in Greek means "nonpassable." With paradoxes and aporias we seem to reach the limits, the end, of our abilities to meaningfully grasp the world and move forward, and come instead face to face with what fractures our familiar ways of thinking and reasoning. When Gottlob Frege learned about Russell's paradox, he thought that the foundations of arithmetic, as he had known them and on which his life's work was based, had collapsed (Fletcher, 1985, p. 1267). A whole field of mathematical logic was brought to a temporary standstill by the discovery of the paradox that provoked the field to reconsider its basic assumptions and, as Niklas Luhmann would put it, "unfold the paradox," to "deparadoxify" the paradox by inventing new distinctions with which to work. Alfred Tarski, for example, proposed just such a new distinction. He argued that since the Liar paradox suggests that the assumption of semantic closure is inconsistent, truth theory must abandon the assumption. "Semantic closure" means that within a language, the adequate usage of the term "true" can be specified for that same language, that is, how one meaningfully uses language can be described in this same language. But the Liar is true if, and only if, it is false, and this suggests that semantically closed language is inconsistent. Tarski then suggested a new distinction to address this problem of inconsistency, namely the distinction between different levels of language, "object language" and "metalanguage" (Tarski, 1944, pp. 347-351).[3]

Similarly, as Livingston notes:

> Gödel's result, which demonstrates the incapability of any sufficiently complex formal system consistently to represent its own logic of proof, was taken to demonstrate *the existence of a metalanguage or -system which is capable of representing the proof of logic of the original system*, as well as the Gödel sentence for that language itself. (Livingston, 2012, p. 29, my emphasis.)

If closure presents inconsistencies, go one level up, and determine the rules of truth/proof on that level, or this is at least the solution to paradoxes that logicians have often proposed. After he had discovered the paradox in set theory, Russell spent four years trying to solve it, until he came up with a solution in his theory of logical types and their hierarchy. His solution to the paradox was, in its essence, simple: "I WON'T ALLOW IT. I FORBID IT! A set cannot be considered as one of its own elements!" (Segal, 1988, p. 85) If a self-referential totality is paradoxical, and given that we want to save consistency and overcome the paradox, self-reference must be avoided:

> [A]ll our contradictions have in common the assumption of a totality such that, if it were legitimate, it would at once be enlarged by new members defined in terms of itself. This leads us to the rule: "Whatever involves *all* of a collection

3 "Object language" is the formal language that the truth theory discusses by using "metalanguage." This distinction between languages makes it possible, according to Tarski, to define those conditions in which true sentences are possible in the object language.

> must not be one of the collection"; or, conversely, "If, provided a certain collection had a total, it would have members only definable in terms of that total, then the said collection has no total." (Russell, 2004, p. 63, emphasis in the original.)

This interdiction of self-reference is then spelled out in the stratification of logical types of sets that allow the membership of a set in another set, but only if the other set is of a higher type. In William Rasch's pithy phrasing: "Poor Bertrand Russell, what a mean father. He was such a splendid procreator of paradoxes, but he cared so little for his offspring, always wishing they would deny their own existence or acknowledge their illegitimacy" (Rasch, 2007, p. 92).

Some solution to the paradox that blocks it in fact underlies most contemporary set theory. Theorists have sought to eliminate the paradox by building hierarchies and levels in which the higher or metalevel comes to supplement the lower level, to close it from the outside, so to speak. But that level again has its own Gödel sentence, cannot be closed with its own means and is in need of a yet higher level — the hierarchy ascends without limit (Livingston, 2012, pp. 27-29). Furthermore, as mentioned, Cantor's and Gödel's theorems are not, interestingly, called paradoxes (at least in the sense of antinomies), but precisely theorems, and the hierarchization, or "parameterization" as Priest calls it, may suggest why. Although their proof involves a *reductio ad absurdum* and paradox, the theorems themselves are established by *choosing* consistency over paradox/inconsistency. Priest and Livingston argue that encountering the paradox presents, in fact, *a possibility of choice* between inconsistency and completeness, although traditionally inconsistency has not been considered a possible choice (Priest, 2006, pp. 24-25; Livingston, 2012, pp. 33-34).

Gödel's incompleteness theorem is "chosen" over the alternative, the provability of the sentence that leads to inconsistency (paradox). Priest argues that it is possible to avoid the paradox and the problem that within a totality, system or a language its own rules of truth or proof cannot be expressed consistently, but only by developing hierarchical metalevels and metalanguages that can do this for the lower-level. This is indeed what the second Gödel theorem suggests: a system cannot itself prove its own consistency, but this proof must be provided at a metalevel. The cumulation of metalanguages, however, risks merely shifting the problem of inconsistency to yet another level (Priest, 2006, pp. 24-25). The requirement of consistency, Priest explains—

> forces on a theory a certain incompleteness, either expressive or proof theoretic. And it is the failure of a consistent theory to be able to express its own truth predicate which prevents it from being able to prove its Gödel sentence. Conversely, any (expressively) complete proof theory is inconsistent. (Priest, 2006, p. 47)

Is the choice between inconsistency and incompleteness a real choice? To claim yes is, of course, a highly disputed argument, for it would mean that inconsistency

would be a real option for logicians and mathematicians to take. Tarski, for example, when seeking to discern where the fallacy of the Liar lies, maps out its constituent parts, two of which are semantic closure and "ordinary laws of logic," including of course the law of the excluded middle and the prohibition of contradiction (Tarski, 1944, p. 348). Tarski does not consider that there could be anything to revise in the "ordinary laws of logic," so for him the fallacy lies in the claim to completeness of semantic closure. Traditional logic has certainly not considered loosening the prohibition of contradiction a valid option. It is an option only for those who would accept that there may be some true contradictions.

We do not need to be concerned here about the details of such rethought logic. It suffices to note that the idea of the possibility of taking different attitudes toward the paradox may have (will have, I argue) an interesting application to formalism in the loose sense (natural languages, all attempts to conceptually group reality into meaningful wholes), as well. After all, it is an ordinary occurrence that formalizations give rise to formalizations of themselves:

> Sets [...] may originally have functioned in our conceptualisation and manipulation of concrete objects; but, sets having been "invented," it transpired that these objects of thought are subject to the very conceptualisation they produce. Similarly, we may suppose that, in response to the need to describe and explain the workings of language, semantic language [i.e. linguistic expression of the appropriate and meaningful language usage; HL] was produced. But having been produced, it was found that this very language applies to itself. Thus, the very acts of conceptualisation produce the closures which give paradox. Even though our conceptualisation/linguistic structure is, in a sense, a human product, it does not follow that we have complete control over what we produce. (This, after all, is the moral of *Frankenstein*, and, in a much more horrific way, of *Capital*.) In particular, a consequence of conceptualisation which must conceive, *inter alia*, of itself is contradiction. We might think of the cumulative hierarchy or the Tarski hierarchy as latterday Kantian attempts to retain a certain control over conceptual production. (Priest, 2006, pp. 47-48)

Once a paradox has been discovered, one can then either opt for consistency and "forget" the paradox, as Luhmann (2004, p. 212) puts it, by constructing ascending hierarchies, or one can take on the pain of contradiction and deal with the inconsistent totality. This is what Livingston calls "the metalogical choice" and "metalogical duality" (Livingston 2012, pp. 52-53). The observation that there are different orientations to the paradox, one seeking to move away from it by making further distinctions, and the other seeking to embrace it and detail the implications, proves a fruitful heuristic mapping also for legal theory interested in spelling out the significance of paradox for law and politics.

1.3.4 Four orientations of thought to totality and paradox

Let us now look at the alternative attitudes a bit more closely as well as what they would mean outside the field of mathematical and logical formalism. Developing from Priest's observations, and borrowing from the work of Alain Badiou, Livingston has created a mapping of four different "orientations of thought" that in different ways deal with limit paradoxes (Livingston, 2012, pp. 51-60). What the emergence of the paradox challenges is the first orientation on Livingston's list, namely the traditional metaphysical attempt at thinking of the totality as a consistent and complete One, as a comprehensive, all-encompassing, contradiction-free Universe. The first orientation is "onto-theological": it posits a privileged being, a God transcendent to the order of beings it founds and the consistency of which it secures. Norms immanent to the order of beings have the origin of their authority in the unquestionable, absolute authority of the privileged being. This is the only orientation in which the paradox remains unreflected and thus has become impossible in post-Cantorian formal thought.

As mentioned above, Livingston calls "metalogical duality" (Livingston, 2012, p. 53) the choice, forced by the emergence of the paradox that makes the consistent and complete totality impossible, between consistency and incompleteness on the one hand, and inconsistency (paradox) and completeness on the other. This choice gives rise to the following three possible orientations. The second orientation is "constructivism," the "critical" (in the Kantian sense) or "criteriological" attempt at tracing the limits of thought, language and knowledge. Badiou provides a trenchant description of this orientation:

> [The constructivist orientation] sets forth the norm of existence by terms of explicit constructions. It ends up subordinating existential judgment to finite and controllable linguistic protocols. Let us say any kind of existence is underpinned by an algorithm allowing a case that it is the matter of to be effectively reached. (Badiou, 2006b, p. 55)

The constructivist, or "criteriological" as Livingston also calls it, orientation is about drawing clear, consistent limits between the sayable and non-sayable, about constructing criteria that allow the "critique" of thinking, language and knowledge, understood as the demarcation of the regulative line between sense and non-sense, knowable and unknowable. It is about "policing" these boundaries, with the conviction that *limits of thought and expression can be consistently secured*. Russell's theory of types is a prime example. The constructivist-criteriological theorist understands himself as standing outside the order the boundaries of which he demarcates. This orientation, when it encounters the paradox of self-reference of the order it studies, resorts to "parameterization," to the construction of hierarchically higher levels from which the boundaries of the lower-level order can be seen, making them consistent and complete. This is the traditional approach of logicians to the appearance of a paradox (Livingston, 2012, pp. 54-55).

The third orientation to paradox is the "generic" one, the orientation represented by Badiou. The main idea of Livingston's interpretation is that, although otherwise his position is the total opposite to constructivism, Badiou shares with the constructivist position the metalogical choice of consistency over paradoxical totality (Livingston, 2012, p. 55). A key element in Badiou's thinking, as we will see in Chapter 5, is Cantor's theorem of power set and the rejection of the inconsistent universal set. If the constructivists police the boundaries of the sayable and what thus can be said to intelligibly exist, Badiou, contrary to such a position, traces the possibility of "the event," the emergence into existence of what is incongruent to and inexistent within the boundaries of a given consistent order of existence and representation. Whereas constructivism forbids the existence of anything that does not fit its consistent categories, Badiou, by extrapolating from contemporary set theory and category theory, seeks to bring this "nothing" to existence. And this is, from the beginning onwards, a *political* theory: a thinking about the emergence of the radically new into the structures that govern how beings can intelligibly live their lives.

There is thus an important *political register* in formalization and the phenomenon of paradox. Capturing entities under general terms, sets or concepts, or indeed any meaningful apprehension of reality *as* something (in exclusion to other possibilities), is about forming totalities and orders, capturing a plurality of separate, singular beings under a common denominator. Formalization in this register is about, among other matters, drawing distinctions between socially intelligible and unintelligible life, between meaningful speech and nonsense, between what is recognized as a topic of "common interest" and what is not, between what is articulated as legally possible and relevant and what is not. Formalization in its political and legal registers is about organizing life under a general form, which allows for something to be recognized as "common" and as "legal," but which, crucially, is simultaneously about the *reduction* of possibilities to organize and understand what is common.

Once the onto-theological orientation and the imaginary of social order (and its reductions of possibilities) as natural, absolute and immutable — complete and consistent — has passed, the reflection on the nature of totalities under which we live and which make our existence meaningful as "common" becomes an issue. This reflection is precisely what the modern *critical project* is about: digging down to the fundaments of the order, to the structures and forms that make possible that something is lived as "in common," as "shared" among a plurality of singulars (like a tradition, but also institutions such as the state or the legal order), and that make possible a language meaningful to an innumerable number of individuals and constitutes them as "speakers" of a language. The critical project of mapping the limits of thought becomes problematic, once it is realized that the very operation of the critical mapping of the structures of commonness in its different dimensions *already presupposes those very structures also as its own condition of possibility*. True critique, in its double epistemological and normative-political meaning, of the limits of thought and meaningful language seems to require a neutral and objective point of view on the other side of those limits, but the paradox of self-reference puts this effort in question.

The constructivist-criteriological project assumes that the circle of self-reference can be broken and a neutral position for social and political critique found. In political and legal philosophy, the constructivist-criteriological attitude has, arguably, given rise to such diverse positions as the social contract theory, Rawlsian theory of justice with its thought experiment of the "veil of ignorance," and the Habermasian discourse ethics as the logical ground of modern rule of law and democracy. They all, in different ways, seek to pin down the internal structure of the consistent (which in political philosophy can be understood as just or legitimate) political collective, and all come to struggle with the problem of self-reference and the inconsistency it implies.

An example of an idea, popular in contemporary political theory, that seeks to break the circle of self-reference but succumbs to it despite itself, is that a political order is legitimate (or just or democratic) if, and only if, all those who are affected by it have a say in how this order ought to be set. The principle strikes one as intuitively plausible. But problems arise when we ask who counts as the "affected," who do we count as belonging to the set of all those who are to have a say on matters that concern them. Being counted within the set of those who have the right to decide on matters that concern them, is certainly itself also a matter of concern. The criteria for drawing the limit between the affected and the unaffected, the concerned and the unconcerned, clearly also fall within the scope of those issues that a legitimate political collective ought to be able to decide (closure). But the scope of those who (have the right to) decide must be presupposed in advance for any such decision to be possible (transcendence). The limit between the affected and the unaffected must be both inside and within the scope of the decision, and outside it as its condition of possibility. The decision of who is affected requires that those who decide are not yet so identified, for otherwise the decision would not be legitimate on grounds of the principle itself. But how is a decision ever to come about if no predetermination is given about who the affected, and thereby the decision-makers, are? The decision-makers, thus, must both be and not be the affected (see e.g. Honig, 2007; van Roermund, 2013a; Lindahl, 2018, pp. 273-278; Näsström, 2016).

This paradox suggests that the legitimacy of the boundary between members and non-members cannot be consistently decided within the order. Political criteriologists have therefore sought recourse to a yet higher, "international" or "universal" order of human rights that encompasses lower-level orders, decides what being affected means for them, and thereby makes it supposedly possible to decide legitimately on the boundaries of membership in lower-level political orders (see e.g. Besson, 2012; Peters, 2009). Human rights are the privileged candidate for seeking to avoid infinite regress, the circling back to the same problem of self-reference that plagued the orders underneath. This is political theory's version of "parameterization," of the hope to ultimately avoid both inconsistency and incompleteness of a political totality.

Badiou's generic orientation follows, as noted, Cantor's theorem of power sets and abandons the idea of the universal set, including its political versions such as the ideal of a consistent universal political-legal order grounded in human rights. The very

idea of a positive, universal political order is inconsistent, incapable of getting rid of the paradox of self-reference. Any order claiming to be universal would have an excess, the set of all those who count as "unconcerned" within it, which means it would not be universal after all. For Badiou, all sets, all positive orders that govern beings, legal ones included, are consistent: they provide non-contradictory presentations as intelligible of what exists. For Badiou, the matter of politics is precisely the unaffected, that is, that which remains incongruent to and indiscernible within any given, consistent positively existing order, showing such order to be incomplete. Rather than embarking on the futile criteriological project of seeking to draw legitimate boundaries, politics is about that what *cannot* be said, thought about, perceived, known, within the boundaries of a given order. This is in contrast to the conventionalism of the constructivist attempt to locate politics neatly within a positive, legitimate (universal) order; for Badiou, politics precisely cannot be located thus. It is rather about the "fidelity to the event" of the appearance of the incongruent, about discerning the coming into "maximal existence" within a given order of something that before was inexistent within it and tracing its implications for that order. For any given positive world, such as a world of institutional politics, the world of international relations, the world of global economy, or the world of a positive legal order, there is an inexistent, that what counts as nothing for it. Politics is then the operation, always particular to the world in question, of bringing that nothing into maximal existence within that given world.

In Livingston's interpretation, at least, this attempt to articulate how what is unsayable, imperceptible, unknowable within an order can nevertheless appear within it and have implications for it leads Badiou to *abandon any critique of the limits of language and structures of sayability* as fully confirming the constructivist-criteriological, and politically conformist, program, and embrace pure mathematics as the only medium in which to adequately express the logic of the event of the new. The generic orientation takes the position that every positive language and order is consistent in its logic of naming what is sayable and doable within it but can be seen as incomplete, as excluding what remains incongruent to it. Hence politics is about carving space to what is irreducibly *exterior* to an order, thus exposing the incompleteness of the positive order in question (Badiou, 2006a; Livingston 2012, pp. 55–56, 187). We return to this admittedly difficult idea in Chapter 5.

Once it is acknowledged that setting limits for political, and legal, orders in a way that would be normatively legitimate is an inconsistent project, there indeed emerges a daunting problem concerning the possibility of political critique of those limits. If the idea of the universal political order and an ultimate neutral and objective viewpoint from which the extant orders can be criticized is inconsistent, is the only alternative the abandonment of critique? Given the embeddedness of critical operations in the structures they criticize, does any self-critique of the limits of extant orders amount to anything more than conformism? This conclusion is what defines the generic orientation in Livingston's scheme. Against this abandonment of all (possible) powers of the self-critique of orders, Livingston, however, sets the fourth orientation in his scheme, which he names "paradoxico-critical." Whereas Badiou's

metalogical choice is to prefer consistency/incompleteness over completeness/inconsistency, the paradoxico-critical orientation prefers completeness over consistency, thus shouldering the pain of contradiction at the heart of every totality (Livingston, 2012, p. 56).

For this orientation, politics is politics of the limits of totalities, taking place at the threshold of inconsistent totalities. Such totalities are always more and other than they are. Their self-inclusion (closure) is necessarily also self-exclusion (transcendence), which arguably implies that self-critique is not necessarily mere conventionalism and "more of the same." This orientation, I will argue, *first*, understands politics as politics of the limits of positive orders, politics that traces the inconsistencies in all attempts to draw the limit between an order and the unordered and to claim this gesture of inclusion and exclusion to be consistently legitimate; and *second*, shows that, precisely because it is paradoxical, an order never achieves a consistent closure, a full control over itself and its rules of intelligible existence-in-common. Affirming the inconsistency of any given totality points to the possibility of a "non-parameterizing," "non-criteriological" self-critique that does not seek a neutral viewpoint at the metalevel, but neither lets positive orders normatively off the hook.

The observation that there indeed exists a metalogical choice thus creates interesting opportunities for analyzing theoretical positions on social totalities and their limits:

> The [metalogical] duality [...] faces critical theory with a crucial choice as soon as it attempts to conceive of the inherent structure of the social order itself. Owing to the implications of the fundamental paradoxes and aporias that are released by the twentieth-century logical and metalogical thought, it is possible to conceive this order as internally consistent, but essentially incomplete (and hence as always capable moving in the direction of *its successive supplementation by what was earlier excluded*) *or* as fundamentally complete (or total) but essentially rent by inconsistency and paradox (and hence *fundamentally structured by division and antagonism*). (Livingston, 2012, p. 284, partly my emphasis.)

Both the generic and paradoxico-critical orientation reject the idea of a single, complete and consistent universal order of full inclusion, an idea that is still present in the criteriological programs of, for example, defending the all-affected principle. But what they do not abandon is what also motivates the constructivist to jump up the levels: the desire not to let positive, contingent orders normatively off the hook with their claims to order life as common. The limits of self-referential orders are also a matter of justice.

1.4 Orientations to paradox in legal formalism: the structure and main arguments of the dissertation

What I propose to do in this work, then, is to use this mapping of the orientations of thought to totality and paradox to analyze positions in legal and political theory. Analogously to the formalisms of artificial languages of mathematics and logic, we can also sketch a mapping of legal theoretical attitudes to paradox. This requires, however, that we re-define the notions of completeness and consistency. What do these notions mean in law?

Law can be understood to be *complete* in the sense that it will give a *legal* answer to every question posed to it. Everything that becomes an intelligible legal problem within a legal system will find some kind of legal answer (even the so-called "hard cases"). Completeness means here that it is within the legal system itself that the distinction between legally relevant and legally irrelevant, between law and non-law is drawn: because law only hears legal questions, it is able to treat conflicts as soluble and give legal answers to them. It is impossible for law to consider the relation between itself and reality in any other way than by using its own means. The positive effect of this is the solvability, in principle, of all legal problems. I thus understand completeness to mean that law can look at reality, *and* its own relation to reality and what distinguishes it from non-law, only through legal lenses.

Completeness, the answerability of legal questions, thus implies, when it is predicated of law, also self-reference. Not all thinkers that we will study agree on what self-referentiality of law means, but I will take self-reference to be such a central feature of law that any legal theory worthy of the name will need to account for it (and because Badiou axiomatically rules out self-reference from "ontology," as we will see in Chapter 5, and ontology is the "field" within which law would be situated in his theory, his theory is fundamentally at odds with the conception of modern law as self-referential). Law's self-reference takes place at several levels. In order for legal judgments and norms to qualify as legal, they need to refer to other legal judgments and norms (higher ones, Kelsen would insist). In other words, law regulates its own reproduction.

Consistency, for its part, has been understood as the central idea of legal decision-making according to which, within a legal system, equal cases ought to be decided equally, unequal cases unequally. This idea expresses the notion of *legal justice* and holds that legal justice is done when a new decision in some important way is the same as a past decision concerning cases that are "equal" to the case at hand, as well as different in comparison to "unequal" cases. Legal justice is, thus, tied to the idea of the repetition of the same norm in similar cases. Legal consistency is also considered in terms of "the rule of law": all acts of public power must have legal grounds and be empowered by the law. Legal consistency has, thus, to do with the identity of the legal system over time. In this work, we will study various ways of understanding this identity: Kelsen's *Stufenbau* (Chapter 2), Luhmann's recursivity (or linkage-capacity) and redundancy (Chapter 3), and Lindahl's iterability of *ipse* and *idem* identity (recognizing again something as the same and as a self) (Chapter 6).

By now, we have learned to be suspicious of self-reference. Indeed, completeness is problematized when one asks how the legal system can *consistently* show or prove that the distinction it draws between the legal and the non-legal, or law and reality, is itself legally valid. If law is complete, a legal system will only be able to give a *legal* answer to the question of what differentiates it from non-law (say, moral norms, facts, acts of political power). This distinction cannot be made by an external authority, say, a legal scholar, natural law or the political sovereign; this would make modern law incomplete and seriously damage its self-referentiality and autonomy, as there would be another authority that would ultimately be responsible for what the law is. In modern positive law, this is unacceptable, at least according to the majority of thinkers that we study in this work. If this is so, if we accept modern law's self-referentiality, we are pushed to an important inconsistency. Namely, each *legal* attempt at showing the legal validity of the distinction between law and non-law must already presuppose this validity. It cannot consistently (in the sense of free from circularity) *prove* it. If the legal totality is autonomous and self-referential, it is also inconsistent. The distinction between law and non-law, a distinction that allows law to formulate the problems it confronts in such terms that make those problems legally solvable, has a price: the legal system cannot *consistently* show this distinction to be validly legal or illegal.

Now, this is, in a nutshell, what I take to be the core of the *metalogical choice in favor of inconsistent totality in legal theory*. We can also understand this problem as the reflexive or metaproblem of justice: it is possible to ask after the justice of the very framework within which legal justice is delivered, but law cannot give a consistent answer to this question, without already presupposing this framework (thus, itself) as just. This inconsistency will also be, for the paradoxico-critics, the site of politics "in" law.

In Chapter 2, we will see that Hans Kelsen's famous basic norm can be interpreted to express precisely this metalogical preference. Conventionally, however, and this was perhaps Kelsen's own understanding of his own work at least up until his late "skeptical" phase, a positive legal order is understood rather as *incomplete*, incapable of assuring that it is contradiction-free. Because the choice of incompleteness comes with the norm of consistency, the incompleteness of the legal system implies a move to a jurisprudential, legal scientific metalevel at which the consistency of the legal system can be guaranteed. In Chapter 2, I will thus argue that Kelsen's account can be interpreted to oscillate between the metalogical choice in favor of a consistent, but incomplete, legal system, and (forcing his late thinking a little bit) in favor of an inconsistent, but complete and self-referential legal system. What is definitively out of the picture is the idea of both a consistent and complete legal system. Kelsen thus oscillates between criteriological-constructivist and paradoxico-critical positions.

In Chapter 3, we will analyze the systems theoretical perspective of the legal paradox. Luhmann understands the legal system as fundamentally paradoxical: it cannot consistently regulate the application of its own code, legal/illegal, with which it operates, to itself. Luhmann argues, however, that for functional reasons, in order

to preserve its functional autonomy in a society of functional subsystems (such as those of politics, economy, education, religion and art), this inconsistency at the very heart of its autonomy must be "made invisible." The legal system will thus attempt to give the impression to society that it is, in fact, consistent. Luhmann thus argues that, yes, a legal system is an inconsistent totality, but it must try to appear consistent, even if this means incompleteness and "coupling" with other subsystems, in particular that of politics, and resorting to a certain "parameterization." Luhmann presents his sociological-constructivist account of de-paradoxification and rejection of the paradox as a counter-position to what he sees as Jacques Derrida's sociologically erroneous affirmation of the paradox. Derrida can indeed be seen as something like a paradigmatic representative of the paradoxico-critical orientation. I will show, however, that because the paradox is by no means effaced by the legal system's attempts at making it invisible, Luhmann's analysis of legal decision-making readily carries the paradox with it. Luhmann thus cannot be clearly categorized in any orientation. He is a "paradoxical" theorist, albeit not a critical one, but rather a paradoxico-constructivist or a paradoxico-evolutionary theorist, as he thinks that inconsistency is an important motor of the legal system's evolution (understood without any sense of "progress").

For this reason, Luhmann's position on the paradox also brings to the discussion the possibility of legal critique and, by extension, politics. "Politics" is the moment of critique, of presenting what Luhmann calls "the Third Question," putting in question law's only inconsistenly validated limits. Luhmann argues that the legal system functions as society's "immune system": it protects the society by offering it mechanisms for conflict resolution and management of disorder. This immune system is also "auto-immune" in the sense that the legal system needs to constantly update and transform itself in order to keep itself relevant for society. It will thus confront challenges that seek to expose its inconsistency by redrawing distinctions that cannot in any final way "solve" the inconsistency. The problem that the (auto-)immunizing structure of the paradoxical legal system poses to politics is law's constitutive inability to "respond" in any direct way to reflexive, political claims: transformation is subordinate to the legal system's self-preservation. Ultimately, the theory of paradoxical totalities risks becoming utterly *nihilistic*, that is, a description of how closed functional systems perpetuate themselves and their instrumental rationalities simply for the sake of self-perpetuation, effacing from view any normative and substantial claim that does not fit with their account of "reality."

In Chapter 4, we will first analyze how Luhmann's constructivism balances a fine line between what could be called a minimal realism and nihilism for which any extra-systemic reality remains unknowable and simply as good as nothing. We will also see how Luhmann's account of the immunitary logic of the legal system connects with contemporary political theory in which this logic is analyzed as paradigmatic of the modern notion of sovereignty: how it claims to protect the commonwealth against threats, but becomes thereby in fact itself a threat to it. Second, we will develop the theme of nihilism further with Giorgio Agamben. He offers a detailed account of modern law both as a paradoxical totality and as utterly nihilistic. Whereas Luhmann

sees in the paradox the impetus for its invisibilization and the system's evolution, for Agamben, all attempts at making the constitutive inconsistency inapparent are exposed as mere juridical fictions in the contemporary conditions of biopolitical nihilism, in which the "state of exception" has become the norm. Agamben's solution to nihilism is "post-juridical" politics: politics that seeks to render inoperative the very exhausted and inconsistent legal system and that de-activates all relations to law. For Agamben, the task of critique, when faced with the paradoxical legal totality, is to carve space for post-juridical "forms-of-life."

In Chapter 5, we will continue with another "post-juridical" account of politics: that of Alain Badiou. As mentioned, his work represents the generic orientation and the metalogical choice in favor of consistent, but incomplete, totality. Consistency is a concept that characterizes *ontology*, within which the "world of law" also theoretically belongs and which is, according to Badiou, best analyzed by set theoretical mathematics. This "throws" the paradox outside the law, into how the political event self-referentially articulates itself. It will be my modest suggestion that from the narrow perspective of the *legal totality*, this metalogical choice is also the problem of Badiou's theory. He magisterially presents a theory of politics that transgresses ontology (and law) and gives a detailed account of "truth" that breaks with "constructivism" that, as we remember, is how Luhmann presents his epistemology. But this seems to come at the cost of going back to "old" legal theory in which the legal order *does not self-referentially* (and inconsistently) decide its own limits. For this reason, Badiou's political theory is, in an important (although not in any simplistic) sense, post-juridical.

In Chapter 6, we will discuss what to me seems like the clearest articulation of a paradoxico-critical orientation in legal theory: Hans Lindahl's account of law as a form of "collective action." His theory seeks to offer a non-nihilistic theory of the paradox that articulates the paradoxical limits of the legal totality as the site of politics. Lindahl's theory of the legal paradox offers an alternative to Agamben's and Badiou's post-juridical politics, one that makes the metalogical choice in favor of the inconsistent totality but also insists on the possibility of a politics of law. From this perspective, a legal system is always different not simply from what it considers non-law, but also *from itself*. In analyzing the legal order in terms of the drawing of legal boundaries, limits and fault lines, Lindahl builds an account of the legal totality as constitutively paradoxical, as an intertwinement of legality/illegality and a-legality, order and unordered, selfhood and strangeness, unification and pluralization. Here inconsistency means the impossibility of considering the totality of a legal system in any other terms than as a paradoxical totality that both includes and excludes itself and its other. This implies that the existence and the identity of a legal collective is constitutively contestable. A legal totality cannot get rid of its non- or "a-legal" alter ego. Its functioning requires both closure and transcendence — inclosure — and this paradox is the site of the politics of law. Lindahl's answer to the threat of nihilistic relativism of contingent legal totalities is, finally, "restrained collective self-affirmation."

Two final notes on my interpretation of the chosen authors and the structure of this work. The heuristic tool of the three orientations and the metalogical dualism will help me to focus my interpretation of each of the thinkers I have chosen, but it will also mean that I will, to an extent, have to simplify my accounts of them. Furthermore, although I in certain respects favor the paradoxico-critical orientation over its alternatives, and although I have tried to build a certain "progressive" narrative to how the chapters relate to one another, my intention is not to suggest that Lindahl's account presents any kind of a dialectical synthesis that unambiguously overcomes the problems of previously discussed theories. As we will see, it in some ways preserves the problems already identified with Luhmann, and intensified with Agamben, although it succeeds, I think, in somewhat nuancing their picture of modern law and its relation to politics. In the Conclusion, I shortly recap the strengths and the weaknesses of the different orientations to the legal totality and paradox, and draw some general conclusions and points of orientation for further research.

2. "The hole in the whole"[4]: Kelsen and the paradox of the basic norm

2.1 Introduction

In this chapter, I bring the mapping of orientations to paradox to bear on Hans Kelsen's theory of law, and in particular his famous basic norm (*Grundnorm*). My argument is relatively straightforward: the basic norm can be interpreted as an inclosure paradox, although Kelsen, at least during a major part of his career, and much of Kelsen scholarship do their best not to admit it. According to the conventional reading, Kelsen is, according to my categorization, a criteriological-constructivist thinker of the limits of legal totality, but I will show that his work can also be pushed toward the paradoxico-critical position.

The notion of paradox is not unknown to Kelsen scholarship, although it has been understood in very different ways and very different conclusions have accordingly been drawn. Stig Jørgensen argues, somewhat similarly to my position, that Kelsen understands the basic norm as a metanorm, and, as such, as external to the legal system, whereas what ought to be theorized is the tautological, self-referential and thereby paradoxical logic of the system that cannot have access to mere externalities (Jørgensen, 1984). For Pierre-Yves Quiviger, the paradox is that on the one hand, Kelsen emphasizes the purity of the theory of law, its being "faithful" and descriptive of positive law (and in this sense it is an empiricist theory), but on the other, the theory is "intrusive," it is an "active" theory that sets theoretical, "non-valid norms" that positive law ought to observe, and thus professes a kinship to a kind of "minimal natural law" (Quiviger, 2017).

Although addressing his critique generally to legal positivism, and not only to Kelsen in particular, David Gray Carlson takes Russell's paradox ultimately to show that legal totalities *à la* legal positivism are impossible because they are contradictory, and hence that law and morality cannot be separated (Carlson, 2013). Carlson accepts the conventional position in logic of preferring consistency and incompleteness as well as Russell's "parameterization" and the type theory of sets. He further argues that Russell's paradox and its solution indicate that also for legal theory, there cannot be "rules of recognition" (Hart) that would be capable of consistently binding legal norms into a legal system. Positive law, Carlson concludes, cannot be distinguished from morality, as such a distinction would presuppose that a consistent closure of a legal system would be possible. Law is thus to be evaluated by moral criteria.

Likewise, the similarities between Gödel's theorems and Kelsen's basic norm have been briefly commented upon (Thevenaz, 1986; van Roermund, 2000, p. 211; Quiviger, 2017, p. 47), and without any formal definition of the paradox in mind, the

[4] I borrow this title from Bert van Roermund's paper (van Roermund, 2000, p. 211).

basic norm has been described, among others, as "shrouded in mystery" (Stone, 1963, p. 35), "a great puzzle" (Paulson, 2013, p. 43) and "an ambiguity" (Stone, 1964, p. 104). What adds to the "mystique" (Stone, 1963, p. 34) is the fact that Kelsen, toward the end of his life, seems to turn away from his earlier characterizations of the basic norm as a "transcendental-logical hypothesis" and redefine it as a "genuine fiction." I suggest that by applying the mapping of different orientations to the problematic nature of totalities to Kelsen's work and its reception, interesting differences arise both in the development of Kelsen's own thought and in the readings that his famous basic norm has received.

In this chapter, then, I will revisit some well-known materials from Kelsen's so-called "classical" or "neo-Kantian" as well as the late "skeptical phases"[5] in order to make the argument that although Kelsen, and many, if not most of his readers, are prone to make the metalogical choice (see Introduction) in favor of the incompleteness and consistency of the legal system, Kelsen's repeated descriptions of the basic norm as being both inside and outside the system push him toward the alternative choice, the one preferring inconsistent totality. Insisting on the purity of the pure theory – that is, that a distinction between facts and norms, on the one hand, and between legal norms and morality, on the other, can be consistently and rationally upheld, and that the legal system must be seen as a non-contradictory system – leads Kelsen to view the legal system as incomplete, completed by the basic norm the necessity and truth (validity) of which is seen from the perspective of legal science. In this sense, he shares with the metaphysical tradition he otherwise criticizes the idea that social order must be seen as rationalizable in a metalanguage. Kelsen, however, lacks access to a metalevel, because he ultimately understands legal science as law's self-reflection, and reflective philosophy comes to its own when it affirms its paradoxical nature, as we will see in a moment.

Furthermore, Kelsen's late "skepticism," expressed for example in his rebranding of the basic norm as a "self-contradictory," "genuine or 'proper' fiction" (Kelsen, 1991, p. 256) — a seemingly surprising change of heart, a "mysteriou[s] reject[ion]" (Bix, 2004, p. 114) of Kelsen's former position that has so vexed his readers — can be interpreted as pointing toward a change in the metalogical preference (that remains, to be sure, implicit in Kelsen's thought). Whereas in his earlier formulations of the basic norm, Kelsen clearly thinks of it as a truth (as a valid norm) that is unprovable in a system it nevertheless completes, and therefore prefers consistency to completeness, his late explicit description of it as self-contradictory suggests instead that the basic norm is a name for the inconsistent closure of a legal system. "The ultimate authority" of a legal order is an inconsistent idea, occupying a place both inside and outside the order it grounds: an inclosure paradox. A reflexive legal theory — legal theory that seeks to make explicit what is already implicit in legal practice, without simply mirroring it, nor merely constructing it — cannot jump to a neutral, external metalevel. There are thus, I suggest, ingredients for a paradoxico-critical interpretation of Kelsen's work, as well.

[5] Stanley Paulson (Paulson, 1998a; Paulson, 1998b, p. xxiii-xxx) has authoritatively discussed the periodization of Kelsen's work.

2.2 Formalism and the purity of the pure theory of law

The basic idea of Kelsenian legal formalism is to study law as a *system of norms*. Kelsen's pure theory of law aspires to be a scientific analysis of the structure of law, regardless of its actual or possible content. "Law is not, as it is sometimes said, a rule" says Kelsen. "It is a set of rules having the kind of unity we understand by a system" (Kelsen 1945, p. 3). The structural interrelations among norms are constrained by rules that jurisprudence can describe. As Joseph Raz puts it, for Kelsen the formalist, "[a] legal system is not a haphazard collection of norms. It is a system of norms because its norms, as it were, belong together" (Raz 1998, p. 48). How exactly they can be understood as belonging together, how it is that they form a whole, is the task of legal science to discover. As Kelsen puts it in a letter from 1933, the pure theory has a "radically universalistic character [...and it] takes as its point of departure *the whole of the law*, the legal system, in order to comprehend from this standpoint all other phenomena as parts of the whole" (Kelsen, 1998, p. 172, my emphasis).

Seeking to study law as a totality implies an inquiry into its limits. As Kelsen explains in 1965, looking back at his long career and the pure theory's central motivation:

> The problem that leads to the theory of the basic norm [and thus also to the theory of law as a whole of a multiplicity of norms; HL] — as I explained in my *Reine Rechtslehre* —is *how to distinguish* a legal command which is considered to be *objectively valid*, such as the command of a revenue officer to pay a certain sum of money, from a command which has the same *subjective meaning* but is not considered to be objectively valid, such as the command of a gangster. (Kelsen, 1965, p. 1144, my emphasis.)

When Kelsen in the beginning of the Second Edition of *Pure Theory of Law* describes his theory as offering "a general theory of law [... as] a theory of interpretation" (Kelsen, 1967, p. 1), he means that he is explicating how it is that "acts of human conduct" (Kelsen, 1967, p. 3) or "acts of will" (Kelsen, 1986, p. 111) can be interpreted, understood or cognized, as legal acts establishing valid norms, in exclusion to being interpreted as mere acts of power or violence. The basic question orienting the pure theory is how a distinction between the fact of power and legal power can be made, and the limit between fact and norm drawn and sustained.

Kelsen calls "subjective meaning" the way in which an individual (or a group of individuals) experiences and understands an event or an act, and this meaning may or may not "coincide with its objective meaning, that is, the meaning that the act has according to the law" (Kelsen, 1967, p. 3). Kelsen gives the example of a group of rebels that kills a man suspected to be a traitor and names its act "death penalty." But such naming only expresses a subjective meaning: in the eyes of the law, and thus "objectively," they commit a murder. Also, the "command of a gangster to turn over to him a certain amount of money" expresses merely a subjective will of that person that the other person undertake a certain activity (handing over the money). By contrast,

the command of a revenue officer expresses an objective legal meaning (Kelsen, 1967, p. 8). The factual acts may "look" the same – a certain amount of money is transferred from one person to another – but their meaning is radically different. For Kelsen, modern law is positive, posited law, law made by human decisions and "acts of human conduct" (Kelsen, 1967, p. 3). Law is historical and made, not given and discovered. It is no longer to be seen as sourced in nature or divine transcendence. As Raz notes, for legal positivism "what is law and what is not is a matter of social fact" (2009, p. 37). There are strict conditions for the possibility of singling out such "social facts," such "acts of will" that qualify as *legal* acts, as acts of norm-making or norm-application, to the exclusion of all those acts that do not so qualify. Only human conduct interpreted as a legal act is able to posit valid law.

So, for Kelsen, "this event [of human conduct] as such, as an element of nature, is not an object of legal cognition" (Kelsen, 1967, p. 3). Positive law is always made by human acts, but simply perceiving acts as events occurring in time and space is not enough to perceive them as legal acts. They may only have a subjective meaning, given to the act by the actor herself. It is on the condition that the event can be seen as referring beyond its mere factuality and subjective meaning to a *norm* that it can appear as possessing objective validity and thereby as a legal act, prescribing an "ought" that validly binds the behavior of its addressee. It is the norm that "confers legal meaning to the act, so that it may be interpreted according to this norm" (Kelsen, 1967, p. 4). A norm functions as "a scheme of interpretation" (e.g. Kelsen, 1967, pp. 3-4; 2002, p. 10) that makes it possible, as Hans Lindahl notes, to objectify events and conduct in the legal sense, to "disclos[e] the fact as 'this' or 'that,' e.g. as 'theft' or 'fraud'" (Lindahl, 2003, p. 775), or indeed as an objective act that validly commands that something ought to be done.

Importantly, this norm (say, one empowering an individual to function as a revenue officer) that makes it possible to interpret the event as a legal command and exclude alternatives, refers to yet another, "higher" norm (say, a governmental tax regulation decree) that again refers to a higher norm (say, the tax law), and the regress can be continued until the highest posited norm (typically within a modern state, the constitution). An event owes its legal meaning to such structural relations within which it can be seen, by the legal scientist, to be embedded. For Kelsen's "legal structuralism,"[6] then, the *legal meaning* of an act or a factual event (or a "sign," if expressed in the language we used in the Introduction), to the exclusion of its alternative interpretations, is a *systemic or structural effect*.

2.3 The contingency of the legal system's perspective of reality

Kelsen is thus acutely aware that events and instances of human conduct can be interpreted in a plurality of ways, and that they do not carry "natural," inherent

[6] As Peter Goodrich notes, Kelsen's legal formalism has affinities with Ferdinand de Saussure's structuralist linguistics (Goodrich, 1983, p. 249).

meanings. An event may be equally well open to causal explanation, moral evaluation and juridical scrutiny. As is well known, Kelsen formulated his theory in response to nascent legal sociology and natural law theories re-emerging after the First World War with the aim of establishing a pure legal science of norms, purged from reducing legal normativity to mere social fact or morality (for an account, see Langford et al., 2017, p. 2). What his legal science proposes to do is to "mak[e] conscious what most legal scientists do" anyway, namely describe how:

> facts [are understood] not as causally determined [as sociologists and natural scientists do], but instead [...] their subjective meaning [is interpreted] as objectively valid norms, that is, as a normative legal order, without basing the validity of this order upon a higher, meta-legal norm, that is, upon a norm enacted by an authority superior to the legal authority [as natural law theorists do]. (Kelsen, 1967 204-205)

Kelsen thus seeks to describe the structure of the specifically *juridical perspective* of reality. In order to do so, he closes legal cognition on two fronts: toward empirically observable causality and toward non-legal normative authority (Kelsen, 1967, p. 1).[7] At the origin of his legal science as a *pure theory* is a constitutive distinction between *legal and non-legal interpretation* (or cognition). In distinction to natural sciences that study reality in its spatio-temporal factuality, the object of legal science is *normativity*, and in distinction to morality that claims to discover moral norms through reasoning or revelation, legal science studies how, and under which conditions, norms can be created through factual human acts. Kelsen thus distinguishes between natural and social sciences, and between social sciences (sociology, legal and political theory), which all have their proper "objects of scientific cognition" (Kelsen, 1967, p. 2), and seeks to isolate what is the proper form of the legal cognition.

In this sense, Kelsen's project can be seen to express what William Rasch calls "a self-differentiated modernity" (Rasch, 2000, p. 10). According to this notion, in modern society there is no longer an all-englobing, totalizing, transcendent perspective that could provide society with a single, undifferentiated image of itself. Its constancy is that of "the inability to occupy a position from which society could be surveyed in one all-encompassing glance" (Rasch, 2000, p. 11.) Kelsen's thought fits with the post-metaphysical and post-Cantorian observation that a universal, consistent and complete totality is no longer possible. Instead, there are a plurality of perspectives and their corresponding orders of meaning that offer meaningful, but incongruent, mappings of reality. The loss of the transcendent foundation and principle of the unity of society, or reality, as a whole is expressed in such fragmentation and specialization of societal and scientific rationalities. Kelsen looks

[7] Paulson, again, has presented critical accounts of Kelsen's "normativity thesis" (the separability of law and fact) and "separability thesis" (the separability of law and morality) (see Paulson, 1992b; Paulson, 2018). Being a formal theory, Kelsen's approach would in principle also apply to a structural analysis of morality, were it understood as a system of moral norms.

at this differentiation of modern society from the perspective of law, seeks to detail the contours of this perspective *as a* perspective, and elevate this description to the status of science. He wants to describe how law can be seen as an autonomous form of rationality, distinct from others. To this end, what is to be avoided is "methodological syncretism" (Kelsen, 1967, p. 1) that can only lead to a blurring of cognitive boundaries.

Pure theory is thus built on the insight that states of affairs themselves do not harbor any intrinsic meaning, but allow for multiple interpretations from a plurality of scientific and normative (moral, legal) perspectives. "Interhuman relations are objects of the science of law *as legal relations only*, that is, as relations constituted by legal norms," implying that alternative ways of making facts intelligible are possible, but excluded (Kelsen, 1967, p. 70, my emphasis). This means that the legal interpretation of a state of affairs or particular behavior is non-necessary, contingent and reductive: it does not consider them from all possible perspectives but prefers the legal one. A Kelsenian answer to Kripkenstein (the problem of the relation between sign and meaning) lies, ultimately, in the *systematicity* of the legal order: "The norm which confers upon an act the meaning of legality or illegality is itself created by an act, which, in turn receives its legal character from yet another norm" (Kelsen, 1967, p. 4; see also Pavlakos, 2018). For legal meaning to exist, for it to be possible to distinguish acts from legal acts, and thus to orient human conduct according to legal command, a legal totality is necessary.

According to Kelsen's *Stufenbaulehre*,[8] or the doctrine of the hierarchical structure of law, each norm refers beyond itself to yet another, higher norm, and the existence of each norm depends on such reference. No legal norm is an island. Legal science "seeks to comprehend each and every phenomenon only in systematic connection with all other phenomena, to comprehend in every legal component the function of the legal whole" (Kelsen, 2002, p. 53). Similarly, each act that has a legal meaning refers to other acts that have legal meaning. A gangster's demand does not register as a legal demand and remains a mere expression of subjective will, because neither legal scholars, legal authorities, nor for that matter the person being robbed, can see the act as referring to any other, higher norm that would confer authority to it and reinforce it (Kelsen, 1967, p. 47).

The existence of the autonomous legal point of view to reality makes possible the distinction between power and legal power, between a mere threat or act of coercion and an authoritative and objective, and in this sense "rational," command and coercion (legal coercion means that law attaches a sanction to behavior it forbids) (see Kelsen, 1967, p. 36, 44–45). Even though endowing this or that event with legal meaning always requires an actual act of will that performs such disclosure, the act itself is not the norm (Kelsen, 1967, p. 10). A norm, as the meaning of an act, persists beyond the actuality of any act. For example, Kelsen explains, "the statute put into validity may be valid long after these men [the legislators] have died and therefore are unable to will anything" (Kelsen, 1967, p. 10). What makes possible this distinction between positing the law as a factual, time- and place-bound and causally or

[8] As is well known, Kelsen received the idea of the *Stufenbau* from his colleague, Adolf Julius Merkl (see Merkl, 1931).

psychologically describable act and the norm it posits is that the legislators act as authorized by the constitution. The higher, ultimately constitutional norm regulates and enables the creation of the lower-level norm by empowering individuals to act as law-makers.

2.4 The problematics of positing a norm as norm-application

Kelsen's important point is that even *acts of norm-positing or creation are also always acts of norm-application*, because only the norms created by those actors who have been authorized by suitable legal norms to act as law-creators count as valid and objective legal norms: "When an individual acts as he is authorized by the norm or behaves as he is permitted by a norm, he 'applies' the norm" (Kelsen, 1967, p. 16). No non-legal, non-empowered, non-applicative act can give rise to a valid norm. This is the basic principle of validity of a positive, and therefore dynamic, constantly changing legal system. It is the basic logic that keeps the legal system together through its change in time. All legal newness must be referred to what is already established as a norm in order to count as valid law, and in this application of extant legal norms of empowerment lies, for Kelsen, the ground of legal objectivity. All acts that perform legal functions, like the decision of a judge or the signing of a contract, are enactments of already extant legal powers. In other words, "the law regulates the procedure by which it is itself created" (Kelsen, 1967, p. 53). Similarly, only those acts of violence are permitted that can be qualified as "attributable to the legal community," that is, that are authorized as sanctions and thus as a reaction against illegal behavior, commanded by properly empowered legal authorities in the name of the collective (Kelsen, 1967, p. 36). The stakes of the pure theory are therefore high: "to achieve the objective validity of *the social order*" (Kelsen, 1945, p. 251, my emphasis).

As Bert van Roermund insightfully observes, for Kelsen, *the authority of law*, the validity of the norm N as a scheme of interpretation of factual behavior and the "ought" it imposes on that behavior, is internally related to *authority about law*, to the legal act that formulates the N, which, in turn, is internally related to *authority in law*, to showing that this legal act truly is such, a valid act according to another, empowering norm of the legal order in question. "A legislator L cannot claim with authority that some prescription or decision P is valid law in NL without implying that his claim to validity, as a legal act, is in accordance with another norm of valid law Q within L [sic; NL]" (van Roermund, 2000, p. 217). Positing a norm discloses a fact as a legally relevant fact. Such positing is about providing a legal interpretation of facts. This positing needs to show, "prove" (*nachweisen*), as Kelsen puts it, that it is valid (Kelsen, 1981, p. 93, cited and discussed in van Roermund, 2000, pp. 206-207). Positing a norm, like the judge delivering a decision in a particular case, requires "proving" that this norm actually belongs to the legal order in question, and not simply claiming this to be the case (van Roermund, 2000, pp. 208-209).

"The one individual wills that the other individual ought to behave in a certain way" (Kelsen, 1967, p. 5). The subjective meaning of this act of will/command may, but need not, correspond to its objective or legal meaning. It is not necessarily, but only contingently, a valid legal command. In another paper, van Roermund helpfully distinguishes between *norm-claims* and their *satisfaction*, and between *bindingness* of norms and their *validity*.[9] A norm-claim or "a *candidate* norm" is "the claim, made by any agent who performs an 'act of will directed at the behavior of another' (e.g. by commanding or requiring some action of someone), that the addressee *ought* to behave in a given manner" (van Roermund, 2013c, p. 20). Legal authorities, judges in particular, present norm-claims when they set new norms, that is, when they command their addressee to behave in a certain way rather than another. To distinguish between norm-claims and their validity is to point out that such a command is not necessarily warranted, and can turn out to be a merely "subjective" act that lacks legal objectivity.

However, "authorities impose norms (thereby proclaiming their bindingness) *under the claim that their validity can be cognitively tracked*; authorities thus expose themselves to a scholarly test which may well prove them wrong" (van Roermund, 2013c, pp. 39-40, my emphasis). A norm-claim that the addressee ought to do something, that she is bound to behave in the manner that the command prescribes, will only turn out to be *a legal norm* if it can be shown, proven, from the perspective of legal cognition, to be a warranted claim. A command that presents itself as applying a higher norm, as being authorized by law is not sufficient for establishing law, but another perspective, that of legal cognition, is necessary to establish *retroactively*, after the claim has been presented, whether it constitutes law or not. This exposure of the norm-claim to cognitive investigation, on the one hand, and the contingent retroactive establishment of the legal meaning of an act, on the other, have multiple implications that we will explore below.

For Kelsen, the expression "invalid norm" is a contradiction in terms; a "valid norm," a redundant expression (Kelsen, 1991, p. 171). Only by going through the test of validity can a norm-claim be established as a legal norm. If the claim fails this test, it never was a legal norm, but only proclaimed to be such. Therefore, van Roermund argues, "[a] binding norm is one whose existence is authoritatively proclaimed; a valid norm, one whose existence is cognitively established" (van Roermund, 2013c, p. 39). Pure theory "attempts to answer the question what and how the law *is*" (Kelsen, 1967, p. 1), and the perspective of legal science (as legal dogmatics), or knowledge of law, as the locus for tracking down if and how a norm-claim can be embedded within the system of law is essential to the establishment of how the law is.

Thus, for Kelsen, positive law is inherently *argumentative* (or justificatory, see Paulson, 2008): presenting claims that need backing up by reasons that themselves are claims backed up by reasons. For Kelsen, "all legal problems are confronted and to be solved as *systematic problems*" (Kelsen, 2002, p. 53). In each particular case of

[9] Already in *Das Problem der Souveränität*, from the year 1920 (Kelsen, 1981), Kelsen distinguishes between the *gesatz sein*, "claimed to be valid" of a willed directive, and its *gesetz sein*, the will as "made to be valid" (van Roermund, 2000, p. 207).

norm-creation, whether a court decision or an enactment of new legislation, it is both possible and necessary to ask after the norm that is thereby applied, and this possibility translates into a regressive questionability. On what grounds is a novel legal *ought* uttered? On what grounds is the distinction between mere force and the force of law made in this particular case? One can always regress, ask for the grounds of legal enactments and to which secondary rules an instance of law-enactment refers as its source of authority and validity. Law-enactments cannot appear as tautologically circular (i.e. have the form "I decide what I decide because I decide what I decide") in order to count as enactments of law. The task of the dogmatic legal science is to answer the questions by taking norm claims as its object and *showing* how they fit into the legal order as a whole (or not). It makes explicit and expresses in the propositional form if and how singular norm claims infer their validity from higher norms (see Minkkinen, 2005, pp. 241-242).

2.5 The basic norm and retroactivity

One can always regress — and here a problem emerges. If law is infinitely questionable and no final reason can be given to a question concerning the validity of a command, the whole "chain of creation" (Kelsen, 2002, p. 56) of valid norms collapses. This is the problem that also Wittgenstein's paradox presents: reasons given for why a rule ought to be followed and how it ought to be followed can always be questioned. The result is "explosion": no command can appear as a valid command, because all grounds for validity can be put to question. Therefore, asking after the validity of a norm-claim must have a limit: a legal order must be closed. It must have an ultimate norm that constitutes the final and unquestionable limit beyond which the questioning cannot go.

The *basic norm* (*Grundnorm*) is the presupposition that such a supreme norm and ultimate, unquestionable limit actually exists: "The validity of the first constitution is the last presupposition, the final postulate, upon which the validity of all the norms of our legal order depends" (Kelsen, 1945, p. 115). *If* a properly legal perspective of reality is to be established (and remember that such a perspective is a contingent, not necessary, matter for Kelsen), there must be a blind spot that opens the perspective but does not itself come into view within it. This blind spot, or the basic norm, is the tacit presupposition, made explicit by the pure theory, held by any legal community that has actually come to be bound by a more or less effective legal order. The basic norm expresses the presupposition, held by a particular legal collective, that one ought to, as a member of this legal collective, behave in conformity with the constitution of that collective (Kelsen, 1986, p. 112). Accordingly, the basic norm expresses the fundamental rule that "coercion of man against man [exercised by the legal authorities in the name of this collective] ought to be exercised in the manner and under the conditions determined by the historically first constitution" (Kelsen, 1967, p. 50).

What exactly the basic norm requires, is a task for the legal scholars of a particular legal collective to debate and find out (see van Roermund, 2000). The blind spot forms the "last reason of validity within a normative system" (Kelsen, 1945, p. 111), the "point of final normative regress" (Thornhill, 2012, p. 420) of a legal order and the questionability of the validity of acts of power and coercion:

> The positivistic jurist, who cannot go beyond the fundamental facts, assumes that this original historical fact has the meaning of "constitution," that the resolution of an assembly of men or the order of a usurper has the normative significance of a fundamental law. Only by making this assumption can he demonstrate the normative meaning of all other acts which he comprehends as legal acts simply because he ultimately traces them all back to the original constitution. The hypothetical basic norm which establishes the original legislator expresses this assumption; it consciously formulates it, nothing more. This means that legal positivism does not go beyond this original constitution to produce a material and absolute justification of the legal order. It stops at that point. The basic norm is an indispensable assumption, because, without it, the normative character of the basic historical event could not be established. (Kelsen, 1945, p. 396)

Kelsen's famous problematics of "the historically first constitution" thus deal with the question of how the political act from which a legal order originates can be seen as legally valid, given that there is no higher norm of positive law backing up its validity, nor can its validity be derived from natural law or God (Kelsen, 1967, p. 199). The constitution-establishing authority cannot be seen as a mere political power, because, for Kelsen, the origin of a legal system can only be legal. From a mere factual act of will no norm can be inferred. But how is then the origin of a legal order established as legal?

The basic norm, Kelsen explains, can only be presupposed (*vorausgesetz*) in juristic thinking as the "scheme of interpretation" of the political act of enacting the historically first constitution. *If* seen through such a scheme, *then* the constitution can be grasped as legally valid. A legal order cannot have, for Kelsen, a simple origin in a specific time and place, because already the act of legislating the very first constitution, insofar as it can produce valid law, must refer beyond itself to a yet higher norm that it applies and that empowers it to act as such constituted-constituent power. *All* acts of norm-creation, with no exception, that are to succeed in what they aim at (i.e. in positing law), must become seen as norm-application. As François Ewald puts it, "[t]he law presupposes itself; it necessarily precedes itself. The fact that the law has no origin assignable to a fact is a fact which characterizes the law as law" (Ewald, 1988, p. 36).

As Lindahl points out:

> [Kelsen's] analysis unveils a paradox at the heart of the law: legislation, in its most powerful manifestation, is the exercise of constituent power, an act that creates the first constitution without being empowered to do so; but because

> the law can only think of power as legal power, an act can only initiate a legal order if it is *retroactively* interpreted as an empowered act — the exercise of constituted power. (Lindahl, 2007a, p. 11, emphasis in the original.)

The political act that seeks to establish a new constitution can only retroactively be seen as possessing legal meaning. It appears as legal indirectly through those acts of legal cognition that treat it as such, that is, through the "demonstrat[ions of] the normative meaning of all other acts which [the jurist] comprehends as legal acts [by] ultimately trac[ing] them all back to the original constitution" (Kelsen, 1945, p. 396), as Kelsen writes in a passage from *General Theory of Law and State* (cited above). Only indirectly, via the cognition of the validity of the lower level norms, can the highest constitutional norm be treated as a valid norm, although it cannot directly be put to the same test of validity than the lower level norms, because it is what makes the test possible in the first place. The basic norm, according to this reading, is nothing more than a concept of the pure theory of law that names this paradoxical retroactive temporality of legal signification.

2.6 The difficult metalogical choice

The constitution, as the final point of normative regress and the limit that makes the closure of the legal order possible, can thus be seen as somewhat similar to the Gödel sentence in the theory of proof that we discussed in the Introduction. It expresses *the general principle of validity of all elements* belonging to the legal system (that norms are valid by referring to a higher norm and ultimately to the constitution), *and* it is a norm itself within that system. The highest constitutional norm indicates that not all the norms of the legal system, *namely itself*, can be shown to be valid by the system's internal logic of validation. A self-referential legal system cannot prove its own consistency, that is, the validity of all of its norms, but contains a norm the validity of which cannot be directly shown. As we discussed in the Introduction, this insight that a formal system cannot prove all sentences that belong to it can be understood to mean a) that the system is incomplete, that it contains a truth that can, and must, be proved in a metalanguage (the constructivist-criteriological position), or b) that the system is inconsistently complete and characterized by the inclosure paradox. (There is also the generic option, which we discuss, as mentioned, in Chapter 5.)

The first choice is the traditional one, geared to make the paradox disappear. As Paul M. Livingston notes:

> Gödel's result, which demonstrates the incapability of any sufficiently complex formal system consistently to represent its own logic of proof, was [at first] taken to demonstrate the existence of a metalanguage or -system which is

> capable of representing the proof of logic of the original system, as well as the Gödel sentence for that language itself. (Livingston, 2012, p. 29)

Making this choice is what characterizes "constructive-criteriological" orientations to the problem of self-referential totalities, and their basic gesture is that of "parameterization," that is, developing metalanguages or -systems within which the true, but originally unprovable Gödel sentence can be proved. The formulation of the basic norm in a way that affirms its paradoxical character, as we just did in the previous subchapter, can instead be understood as characteristic of the paradoxico-critical orientation to totality and based on the choice to see the legal order as inconsistently complete. However, such affirmation of the paradox is by no means the only one in Kelsen scholarship. Quite the opposite: it seems to me that both Kelsen himself and most of his reception has rather had the intuition to choose the traditional option: that the basic norm is a truth that comes to complete the system from the outside, allowing it to be seen as free from contradiction.

For example, Alf Ross, Kelsen's student and a famous representative of Nordic legal realism, discusses at length the problematics of the highest constitutional norm in his famous essay "On Self-reference and a Puzzle in Constitutional Law" (Ross, 1969). His account exhibits, I think, a preference for consistent incompleteness. Ross's argument amounts to saying that the highest constitutional norm is incapable of consistently regulating its own amendment, and therefore a non-positive norm of legal reasoning must be presupposed as a true axiom, as "the ultimate basis of all deductions" "not [itself] demonstrable in the system" (Ross, 1969, p. 21). The non-positive basic norm expresses the obligation to obey the delegation of the highest authority to its successor,[10] which, Ross claims, makes the amendment of the highest posited norm consistent from the outside, as it were, and "enables us to express *without logical absurdities and contradictions* the ideas which actually govern the behaviour of people" (Ross, 1969, p. 24, my emphasis).

Kelsen seems to share Ross's metalogical choice, at least during his "classic" and "neo-Kantian" phases (see Paulson, 1998a). Kelsen sees the presupposition of the basic norm as a necessary supplement to the actual posited legal order that, by itself, is incomplete, incapable of showing the validity of all its norms: "the function of the hypothetical basic norm [is] to shape the empirical legal material into a meaningful, that is, a *non-contradictory* order" (Kelsen, 1945, p. 439, my emphasis). For Kelsen, it is the basic norm that "accounts for the unity of a plurality of legal norms" (Kelsen, 2002, p. 55). Legal science whose task it is to see the structural connections between posited legal norms can see the necessity of the presupposition of the basic norm for the task of unifying law into a consistent order. This, Kelsen thinks, eliminates the threatening inconsistency of the constitution, that the legal status of the highest norm is unstable, and, by implication, of the legal system in question as a whole. Although the basic norm cannot be proved valid intra-systemically, it must necessarily be

[10] It says, according to Ross: "Obey the authority instituted by art. 88 [the highest constitutional norm of Denmark], until this authority itself points out a successor; then obey this authority, until it itself points out a successor; and so on indefinitely" (Ross, 1969, p. 24).

presupposed as true, that is, *as valid* by legal science (e.g. Kelsen, 2002, p. 58; Kelsen, 1965, p. 1143).

Only a valid norm can ground the validity of lower level norms, and allow the whole to be seen as consistent. "With the postulate of a meaningful, that is, non-contradictory order, juridical science oversteps the boundary of pure positivism. To abandon this postulate would at the same time entail the self-abandonment of juridical science" (Kelsen, 1945, p. 437). This requirement of consistency excludes the affirmation of the legal closure as an inclosure, as a paradox. Seeing the legal system as a contradiction-free pyramid of valid norms through to the highest norm (Kelsen, 1967, p. 201) requires a metalogical choice that the ultimate limit is a truth unprovable internally, but suggesting an external point of view from which its truth can be seen.

While I think Kelsen's intuition is, at least initially, to prefer incompleteness of the legal system to its inconsistency, there are, however, no available avenues for proving the truth of the basic norm. This is basically because, as I will try to show in the following, Kelsen's legal theory is *reflexive*. It is supposed to be a theoretical reflection of what the legal practice already "unconsciously" presupposes, and this reflexivity forbids the recourse to ascending external metalevels on which the truth of the legal closure could be established.

Kelsen vehemently banishes the recourse to natural law, God, and political power from the list of candidates for explaining the contradiction-free unity of the legal system. However, it seems that he nevertheless shares with the tradition of natural law the conception that the social order must be open to being rendered consistent, and such rendering requires taking a step back to a meta-position. For metaphysical thinking, there were clear avenues available for finding metalanguages and metanormativity external to human law within which such law's legitimacy could be discussed. For Kelsen the post-metaphysical legal thinker, however, such avenues are closed.

Kelsen can thus, I think, be seen as struggling to reconcile 1. his metalogical intuition that although a legal system cannot close itself by its own means and prove its own consistency, it cannot be conceived as inconsistent, which in turn suggests that a leap ought to be taken to a metalanguage in which its consistency can be shown, and 2. his rejection of the traditional ways of conceiving metalanguage in legal theory. It is expressive of this struggle that Kelsen himself at an occasion speaks of the basic norm as "the minimum [...] of natural law" (Kelsen, 1945, p. 437). It has been duly noted by Kelsen scholars (although they disagree with its details and implications) that since Kelsen's positivism is not empiricist, that is, for him the task of legal science is not to observe positive laws as empirical facts but to give a formal account of positive law and thereby formalize it, the scientific focus on positive law brings with it *a non-legal normativity, a law of law* (see e.g. Raz, 1998; Quiviger, 2017; Minkkinen, 2005). The difficult question is how such a "law of law" is to be understood, given that a recourse to an external normativity is not available.

As is well known, Kelsen attempts to find the third way between the two traditional avenues of natural law and mere political power by drawing an analogy to Kant's transcendental method:

> Kant asks, "How is it possible to interpret without a metaphysical hypothesis, the facts perceived by our senses, in the laws of nature formulated by natural science?" In the same way, the Pure Theory of Law asks, "How is it possible to interpret without recourse to meta-legal authorities, like God or nature, the subjective meaning of certain material facts as a system of objectively valid legal norms that are describable in legal propositions?" (Kelsen, 1967, p. 202, translation slightly altered.)

The recourse to neo-Kantianism has been interpreted as Kelsen's attempt to build a "philosophical theory [in which to] demonstrate the transcendentally necessary presuppositions on which the claim of the positive law to validity rests" (Edel, 1998, p. 219). However, Kelsen's Kantian arguments have often not been received as successful in making plausible a case for the transcendental a priori truth of the basic norm in the sense of Kant's transcendental philosophy (see e.g. Paulson, 1992b; Hammer, 1998; Luf, 1998). Stefan Hammer's critique exemplifies the disappointed expectations:

> The transcendental nature of a Kantian theory of knowledge does not [...] overcome metaphysical pseudocertainty simply by presenting indemonstrable presuppositions as, so to speak, problematic objects. Rather, conditions that are prior to any theoretical reference to objects *must be shown*, lest the possibility of such reference not be established at all. (Hammer, 1998, p. 185, my emphasis.)[11]

It is widely believed that *demonstrating* the truth of the basic norm is not what Kelsen's "transcendental argument" amounts to, although this is precisely what is expected of it. Kelsen would then end up in something like a "weak parameterization": upholding the belief that the basic norm is a valid norm not provable valid inter-systemically, without, however, being able to formulate a proper metalanguage within which to successfully show this validity.

As an alternative to neo-Kantianism, the basic norm has also been interpreted as holding an analogous metalinguistic status to Alfred Tarski's attempt to solve the semantic paradox (according to which, as we saw in the Introduction, the truth theory of a language cannot be consistently described in the language itself) by distinguishing between the "object-language" and "meta-language." Gerhardt Plöchl argues that although Kelsen was apparently unfamiliar with the details of the state of mathematics and semantic logic of his time, he "established a theory of [legal] science according to the same principles that [...] could be found in the latest developments of logic and mathematics" (Plöchl, 1990, p. 140). By "the latest developments" Plöchl means the attempts to solve the Liar and Russell's paradoxes by what we above called (following Priest and Livingston) "parameterization."

[11] Priest (2002) presents an analysis of Kant's transcendental categories that shows how also Kant ends up in paradoxes.

> [I]f Kelsen had chosen the term "metanorm" for this presupposed norm instead of "basic norm," then it would be evident that his problem had the same structure as Tarski's [the need for a distinction between object-language and meta-language]. Such terminology would not have been far from Kelsen's own use, because he called "meta-legal" all those authorities (like God or "nature") to which validity is traced back in natural law systems. If it is essential for the concept of a legal order that its norms "must be created by a specific process," that they are "created by a legal authority," then a norm which has not been created in this way, is not a norm but a meta-norm, which "decrees" — logically — the validity of the norm that is described by the person that presupposes the meta-norm for logical reasons. (Plöchl, 1990, p. 136)

According to this conception, legal theory is a metalanguage capable of logically showing the truth of the basic norm and, hence, the validity of the highest posited norm that the positive legal system itself is unable to do.

Kelsen himself, in response to Julius Stone's fierce critique, suggests that the basic norm can indeed be understood as "meta-legal" "if by this term is understood that the basic norm is not a norm of positive law, that is, not a norm created by a real act of will of a legal organ" (Kelsen, 1965, p. 1141). However, he adds that:

> [i]t [can also be understood as] "legal" if by this term we understand everything which has legally relevant functions, and the basic norm pre-supposed in juristic thinking has the function to found the objective validity of the subjective meaning of the acts by which the constitution of a community is created. (Kelsen, 1965, p. 1141)

The basic norm cannot be understood only in terms of an external metalanguage, because it also "belongs" to the actual legal order, is relevant for it. The basic norm is inside the legal system, because "[t]he quest for the reason of validity of a norm is [...] terminated by a highest norm which is the last reason of validity *within* a normative system" (Kelsen, 1945, p. 1145, my emphasis). The basic norm is the presupposition that there is a valid highest norm that closes the legal order.

In persistently describing the basic norm in these terms, as being both inside and outside, Kelsen is characterizing the closure of the legal system as an inclosure and the basic norm as a paradox. The legal system will close itself, if it is to emerge at all, but this closure remains inconsistent, oscillating undecidably between validity and being beyond validity. Kelsen's conviction is that there cannot be science without the rule of the excluded third and this rule says that the legal order as a whole must be cognized as free from contradiction, but the very articulation of the legal perspective pushes Kelsen directly into the blind spot and inconsistency, and into implying, somewhat inadvertently, that inconsistency is, in a specific sense, actually productive for law and legal science.

2.7 A reflexive, and paradoxical, theory of the basic norm

It might then be misguided to expect from Kelsen an independent proof for the basic norm, as many of his readers seem to do. It should be noted that Kelsen, after all, characterizes the basic norm as a "presupposition" and a "hypothesis" — that is, as something *not proved*, and this being-outside-of-proof character is only emphasized by the late description of it as a "genuine fiction." If the basic norm is something that closes the legal system from the outside, its truth is not, for that matter, formulable in a language external to the system.

Indeed, as we saw in the Introduction, to formulate the truth of the basic norm in a metalanguage would again produce a Gödel sentence necessitating a yet higher metalevel with its Gödel sentence *etc. ad infinitum*. The expectation that Kelsen would be able to provide an independent argument for the truth of the basic norm, and to prove the hypothesis correct, misunderstands that Kelsen's project is *reflexive*. Kelsen cannot have a theory of ascending levels, precisely because such a theory would not be faithful to its object, it would not correctly describe law's self-reference, namely that it regulates its own reproduction. As Herbert Schnädelbach points out:

> [m]erely metalinguistic speech is [...] *per definitionem* non-reflexive. The attempt to grasp its constituting rules in a metatheoretical fashion leads to the well-known endless hierarchy of metalanguages, in which reflexivity has no place. (Schnädelbach, 1977, p. 136, cited in English in Gasché, 1986, p. 78.)

After all, Kelsen only claims to "mak[e] conscious what most legal scientists do" anyway (Kelsen, 1967, p. 204), "consciously formulat[ing]" what is already assumed (Kelsen, 1945, p. 396). The pure theory does not claim to do more than make explicit what is already implicit in the very practice of positive law: it claims to be positive law's *self-reflection*.

To be sure, Kant's transcendental philosophy (like all forms of transcendental philosophy, Edmund Husserl's phenomenology included) is also a philosophy of reflection: cognition of the structures of cognition. But as Livingston notes:

> in their initial formulation, such structuralisms typically take the critical form of the *criteriological* orientation [to the limits of thought and language]. Seeking to adumbrate structural principles and rules underlying the possibility of sense, they attempt a *juridical* regulation of language based on an examination of what are seen as its original founding principles. [...] However, the criteriological attempt to delimit language by means of an elucidation of its structure leads, almost inevitably, to a series of formal paradoxes that destabilize the boundary-drawing project [...], as soon as language is itself conceived as a *total* object of (linguistic) description. (Livingston, 2012, pp. 65-66, original emphasis.)

This being-led-to-paradox, it seems to me, is exactly what happens to Kelsen's criteriological orientation as well. He has the intuition that the theory must be pure and the limits of law cognitively rationalized and secured, "policed," by a rational "law of law," but he cannot help but describe his findings in a way that suggests an inclosure paradox rather than a theory of ascending levels, each of which would secure the rationality of the boundaries of the lower one. In a sense, reflective philosophy becomes aware of its own nature when it assumes itself as a paradoxical enterprise and acknowledges that the project of drawing the limits of thought takes place self-referentially in the very act of thinking.

Kelsen insists that the basic norm "is not an 'intellectual construct'" because "it is not 'created' by juristic thinking, but *presupposed* in it" (Kelsen, 1965, p. 1148, original emphasis). But clearly Kelsen also does more than simply "presuppose" the basic norm — he analyzes it at length over the course of his whole long career (indeed, Kelsen himself says that "[a]bout no other problem have I said so much as about the basic norm" (Kelsen, 1965, p. 1143)). Kelsen describes at length in legal science the very foundation (the pre-supposition, *Voraus-Setzung* (Kelsen, 1965, p. 1149)) on which this activity itself is grounded. The pure theory claims to make explicit — not construct — not simply what the ordinary jurist and the member of a legal collective implicitly presuppose in their legally relevant behavior, but *what the legal scholar must presuppose as well*: that there is law, that an effective and valid positive legal order "is taking place." As Kelsen often argues, law is not valid because it is efficacious, but it would not be valid, were it not sufficiently efficacious (e.g. Kelsen, 1967, p. 211).

This makes sense as an idea of reflective legal philosophy: legal theory describes what the practice already presupposes in its very operation, namely that there is an effective legal order that empowers and obligates its authorities and members to act in specific ways, ultimately according to the constitution as the highest rule. If "the framework is shown as pre-established in being used, not by being mentioned on a metalevel prior to its use," as van Roermund suggests, legal theory can be understood as law's self-reflection: making explicit what the legal community (that includes legal authorities and ordinary members but also legal scholars) as a whole presuppose in their very "joint action" (see van Roermund, 2013c, p. 38), namely, that "we, as members, authorities and scientists of this legal collective, ought to behave in the way prescribed by the highest norm of the legal order, the constitution."

Note that to describe the basic norm in this manner is different from a sociological, i.e. an external description of what people believe, because it expresses reflexivity. That the legal order is more or less effective, requires that people take "commands" by legal authorities as legally binding on their behavior, as orienting their conduct in the world and toward each other. As Kelsen puts it, the final answer to the child that questions why he ought to obey his father's orders can only be that God has so commanded and that "*as a believer*, one presupposes that one ought to obey the commands of God" (or in a more contemporary phrase, because this is what the rules of this family say, and as a member of this family, one ought to obey its rules) (Kelsen, 1986, p. 112, my emphasis). Analogically, the ultimate answer to the question "Why ought the law be obeyed?" is that as a member of the legal collective whose law it is,

one is presupposed to obey its law. That is what its members do as members. While in the legal practice this "ought" is only proclaimed and implicitly assumed (like when the legal authorities claim to apply the law in accordance with, ultimately, the highest constitutional norm and their addressees, i.e. the ordinary members, take these claims as binding and orienting their behavior), in legal theory (legal dogmatics) such claims and assumptions are tested, hypotheses about the exact content of this "ought" are formulated and debated (see van Roermund, 2000, p. 210).[12]

2.8 Reflective legal theory and the logic of the supplement

Self-reflection always implies difference: a difference between "me and myself," between legal practice and legal theory, although the theory is nothing but a theory, a self-reflection, of the practice. As law's self-cognition and self-understanding, the theory introduces a difference into the legal unity. This difference is similar to my self-reflection: when I am thinking about myself, I am both the one who thinks and the one who is thought about. In self-reflection, one stands both inside and outside oneself and is, in this way, a "unity in difference." One stands within the something one attempts to grasp as a totality; an endeavor that necessarily leaves a blind spot and makes a leap to a neutral, disembedded level impossible (if, that is, the reflexive character is to be maintained):

> The purpose of reflective philosophy is to elucidate, explicate, or disclose the *implicit* structure of possible, or merely actual, experience. For here, it is said that "to analyze is to explicate the implicit." The development of reflective philosophy may be understood as a growing consciousness of the nature of the primary task of philosophy: to render the implicit explicit. (Bartlett, 1975, p. 185, citing Ricoeur, 1967, p. 99, original emphasis.)

[12] Does this reading not conflict, however, with Kelsen's unambiguous critique of recognition theories, that is, of views according to which law's ultimate authority lies in its addressees' "agreement" to obey it (Kelsen, 1967, p. 218, footnote 83)? However, as van Roermund argues, "Kelsen expelled recognition theory from the Pure Theory of Law for the wrong reasons; and [...] he tacitly reintroduced it for the right reasons" (van Roermund, 2013c, p. 32). It is not that recognition means that the addressee of the law and the legal authority must share the *same* interests in order for the law to be obliging, as Kelsen thought. It is, rather, that insofar as law is regarded as imposing *duties* to its addressees, it "is dependent on the legal subject's free, intentional reconstruction of official utterances or actions as not only reasons for action in general, but as reasons for *her* action" (van Roermund, 2013c, p. 33). A legal system would remain utterly superfluous and virtual were it not recognized by the legal subjects as binding on *their* action *here* and *now*. This does not mean that they would need to normatively accept or agree with the "rightness" of the duties in any moral sense, but simply recognize that a norm-claim by a legal authority is addressed *to them*, regards them as members of this legal collective and, on this basis, requires of them certain kind of behavior rather than another. The requirement of recognition does of course not presuppose that all those addressed must in actual fact act legally, but only that typically a legal order is regarded by its addressees as binding on them and their actions in concrete situations (whether or not they always fulfill legal expectations). I come back to the theme of recognition in Chapter 6.

As Bartlett further points out, reflective philosophy "may obtain certain descriptive results concerning such notions as 'pre-reflective experience' or 'the implicit,' but these results cannot be taken out of relation to frameworks rendering those results possible" (Bartlett, 1975, p. 188). Accordingly, legal theory is not a mere mirroring of legal practice, but has constitutive implications for its object, without this implying mere constructivism.[13] Legal signification — the constitution of acts of will as having as their meaning a legal norm — is not mere constructivism, because it responds to an act that it takes as making a claim to validity. As Kelsen puts it in his posthumously published work *General Theory of Norms*, the validity of the legal norm is "*conditional upon* the act of will of which it is the meaning" (Kelsen, 1991, p. 234) (my emphasis); or in Derrida's words: "the order of intelligibility depends in its turn on the established order which it serves to interpret" (Derrida, 2002, p. 270). Legal signification as a response also implies that it is reductive, and that other ways of interpreting the act were possible. Legal cognition is not mere mirroring, because that act to which it responds is only a claim to validity, exposed to a cognitive response that confirms, or not, its legality. Understood in this way, as *responsive*, legal signification, the disclosure of an act as a legal act, begins outside the law, that is, in the act of will, and unfolds as a response to the claim that the act expresses, confirming or disconfirming its legality.[14]

We can formulate the legal inclosure paradox as the ultimate limit of the legal order that both belongs to it as its valid foundation and escapes it as impossible to prove valid by the order's logic of belonging. To understand this paradox in the temporal terms of responsivity is, thus, to say that at no point does a legal collective encounter its factual origin directly, in a specific time and place. The act that inaugurates it can only be seen as such, as an inaugurating act, retroactively, as what the already established, effective legal practice and its description by legal scholars presuppose as the final point of validity of their cognitive endeavors. This paradoxical temporality is what Jacques Derrida calls "the supplementarity of origin" (or originary supplementarity) (Derrida, 1967, p. 314): the origin or foundation (the *hypothesis* in its Greek meaning, see Edel, 1998) can only be accessed *indirectly*, by the mediation of what allegedly comes only later, as indicating that foundation as its own ground. As Jean-Pierre Dupuy and Francisco J. Varela explain:

> another term, supposed to be secondary and subordinated, and which should be nothing other than a derivation or complication of the primary Concept (for instance: culture, writing, form, etc.), appears as indispensable to the constitution of the latter. The origin appears as full and pure but, without the supplement which nevertheless follows from it, it would lose all consistency. Thus the secondary term appears at the same time as perfectly dispensable and

[13] For these reasons the basic norm is also different from H. L. A. Hart's "rule of recognition" (Hart, 2012, p. 100) the existence of which is "a matter of fact" (Hart, 2012, p. 110).

[14] Ferdinando Menga (2018, p. 48 ff) has recently presented an account of the experience of meaning along these lines. Lindahl's work also articulates this point, and we will return to it later on.

> perfectly indispensable. Even the most apparently perfect totality suffers inescapably from a constitutive lack. (Dupuy & Varela, 1992, p. 2)

Legal cognition appears as both perfectly dispensable — surely it is the legal authority who posits the norm and not the legal scholar — and perfectly indispensable, for only from the perspective of legal science can the structural position of the posited norm vis-à-vis other norms be articulated and, hence, the validity of the norm claim verified or falsified. The logic of the supplement thus deconstructs a strict distinction between the creative power of authorities and the descriptive stance of legal science. What we have instead is an "entangled hierarchy": "the form of a circular causality unifying two terms in spite of the fact that one claims to be hierarchically superior to the other" (Dupuy & Varela, 1992, p. 3).

Legal theory cannot, thus, be conceived as purely constitutive, as constructive of law, because acts of will, not acts of cognition, posit the law; but neither can legal theory simply mirror law, because acts of will are only norm-claims, exposed to cognition that will or will not recognize in them the mark of validity. Legal practice and legal cognition are then "two levels which must be kept distinct, and yet which are undeniably intertwined" (Dupuy & Varela, 1992, p. 5). Cognition is the necessary supplement, because without it, positive law does not come to its own as a system of valid norms. But cognition, as a "mere" supplement, denies its creativity in its very operation, and assures the legal collective that it is simply describing what the law already was, without creating it for the first time.

However, this is to read Kelsen through the lenses of the mature position of paradoxico-criticism, and therefore it is not as such, it must be admitted, reflected in Kelsen's text. Kelsen could hardly offer an explicitly deconstructive theory of law. By contrast, he insists, for example, on the difference between the "authentic legal interpretation" provided by the law-creating legal organ when it creates a general norm (not applicable only to a particular case), on the one hand, and the "inauthentic" legal scientific interpretation of the law and the interpretation of the law by the rule-following individual, on the other:

> This act of will creates [...] a lower-level norm[.] This act of will differentiates the legal interpretation by the law-applying organ from any other interpretation, especially from the interpretation of law by jurisprudence. [...] The interpretation by a law-applying organ is different from any other interpretation – all other interpretations are not authentic, that is, they do not create law. (Kelsen, 1967, p. 354)

In his theory of legal interpretation presented in the second edition of the *Pure Theory of Law*, that is, in the application of the higher-level norm and the creation of the lower-level norm by means of interpreting the meaning of the higher norm, Kelsen clearly holds a "mirror view" of legal scholarship: it merely describes, without constituting, the law already created by the law-giving organs. There is no acknowledgement of the paradoxical temporality of retroactivity in this theory.

Furthermore, for Kelsen, the law-giving organs themselves interpret legal norms in particular cases on grounds of what Kelsen calls "the frame": "the law to be applied constitutes only a frame within which several applications are possible, whereby every act is legal that stays within the frame" (Kelsen, 1967, p. 351). Legal interpretation in rule-application is not mechanical, but the way in which the higher-order norm binds the lower-level norm can never be "complete," because it leaves room for "discretion" and several interpretative possibilities offer themselves to the judge. However, these possibilities are already given within the law and are simply waiting to be discovered. Not only the political legislator but also the judge create law by applying a higher-order norm and selecting one of its possible applications that are all of equal weight. There are no absolutely correct applications of the norm that legal science could establish. Instead, the selection is a matter of "legal politics" and *will,* not simply cognition, is involved in identifying what the rule means in a particular case. Acts of will are free to choose how the norm ought to be applied in the case at hand, although this will is not absolute. Law-creation is not unsupported by the already extant law, for the decision must pick an application already provided by the frame (Kelsen, 1967, pp. 349-353).[15] "In the application of law by a legal organ, the cognitive interpretation of the law to be applied is combined with an act of will by which the law-applying organ chooses between the possibilities shown by cognitive interpretation" (Kelsen, 1967, p. 354).

The task of legal science, then, is to provide the cognitive interpretation and make manifest which possibilities there are for the will to pick:

> [J]urisprudential interpretation [...] *exhibit[s] all possible meanings of a legal norm.* Jurisprudence as cognition of law cannot decide between the possibilities exhibited by it, but must leave the decision to the legal organ who, according to the legal order, is authorized to apply the law. (Kelsen, 1967, p. 355, my emphasis.)

This amounts to an exercise of complexity- and ambiguity-reduction within the law and by science, of clarifying indeterminacies and insecurities of meaning and application that could otherwise emerge. Legal-scientific representation of the possible applications of a norm advances legal consistency, Kelsen argues, and thereby the rule of law or "legal security" (1967, p. 356). As Lindahl characterizes Kelsen's understanding of the legal frame and its exhibition by the legal cognition:

> the scientific viewpoint allows legal cognition to reproduce, by way of legal propositions, *all and only those meanings contained in a norm*. To interpret is

[15] Kelsen argues, however, that "authentic" interpretation can also create law beyond the frame, and that for instance supreme courts may create new valid norms in this way (Kelsen, 1967, p. 354). This raises the question of the relation of such creation to the higher-order norm supposedly empowering authentic interpretation and to Kelsen's other argument that it is legal cognition, not mere norm-claim by a legal organ, that is needed to establish new law. Van Roermund claims that the distinction between "validity" and "bindingness" solves this apparent inconsistency (van Roermund, 2013, p. 25-26).

> to represent, and to represent is to articulate an original range of meanings given *directly* to cognition. (Lindahl, 2003, p. 774, my emphasis.)

However, if this is the case, if the scientific, cognitive interpretation simply mirrors or directly copies a range of possible meanings *already there* in law, the specificity of both the original, implicit scope of possible meanings and the posterior, explicit scope seem to be lost. What, in fact, can differentiate them, if legal cognition simply repeats what was there already? To insist that legal theory and legal propositions are *purely descriptive* (like Kelsen seems to think in the *Pure Theory*)[16] risks obscuring what added value the legal scientific framing may bring.

For this reason, I think Kelsen has two possibilities (neither of which he takes). I cannot discuss these options and the implications they would have for Kelsen's work at length here and will only put them on the table, so to speak. If Kelsen wants to hold on to the view that a legal norm, as posited by a legal authority, "possesses" in some sense its own application/meaning prior to its interpretation, and if he still wishes to defend the view that legal cognition has added value, he can think of the norm prior to its interpretation as simply the scope of all cases of its application. This would be to understand the norm *extensionally*, as simply defined by its applications (the scope of which may in principle be infinite), rather than intensionally, defined by a concept, textual meaning of the norm, the will of the legislator etc. A pre-interpreted legal norm would simply be the open set of all its applications and interpretations. Legal cognition would then provide a representation that articulates all applications that are possible for that norm. In other words, a norm is the extension of all cases of its application, and the added value of the scientific representation is to show how the norm may be applied by taking into consideration, for example, the hierarchy of norms and the systematic relations of norms to other norms, thereby providing "the frame" for how the norm may be applied in a valid manner. Here representation is not mere repetition of the original set, but it provides an "excess" of information as it groups the norm with other norms.

As we will see in our discussion on the basic set-theoretical grounds of Badiou's "metaontology" in Chapter 5, extensionalism and the distinction between a set and its "representation" is not, however, a reflexive relation, but quite simply the formation of a "scientific norm," a "law of law" that stipulates on what conditions a single norm may be applied by legal authorities. By choosing the extensional understanding of the norm, Kelsen would need to abandon the understanding that legal cognition is reflexive, law's own reflection of itself that seeks to make explicit what was already implicit in the law, without constituting a separate metalanguage on top of it.

The alternative would be to relax the strict distinction between "authentic" or law-creating acts and "inauthentic" or merely interpreting (reproducing) acts. This would lead to the dropping of the frame theory of interpretation insofar as it is accompanied by the idea of the pre-interpreted norm having a fully independent

[16] There exists, of course, the well-established debate whether Kelsen abandons the view that legal theory is merely descriptive and comes to endorse the view that it has constitutive, "law-creating," significance. I cannot, however, enter that debate here.

identity (intensional or extensional), and understanding interpretation in terms of "the scheme of interpretation" that we discussed above. Each act that posits a legal norm must claim validity to itself, requires a claim to empowerment by other norms already in place. Legal cognition is responsive to such claims, exercising constitutive power on law to the extent that it establishes whether and how the norm-claim fits within the legal system and whether and how it can be legitimated and, hence, the norm it posits rendered a valid – legal – norm. Legal cognition is, thus, neither merely descriptive nor merely constitutive of law, but precisely reflexive, keeping law and its cognition in a mutually constitutive relation in which neither side has absolute independence. Taking this option brings us back, however, to the paradoxico-critical view of the legal totality.

2.9 Self-contradictory, but useful: the fictitiously willed basic norm

Acknowledging a certain anachronism in my reading, which shows Kelsen's work in a light that he never himself explicitly intended, I propose to read Kelsen's late characterizations of the basic norm as a "fiction" and his surprising affirmation of a "fictitious act of will" from the paradoxico-critical perspective. Kelsen's late reflections on the basic norm as "self-contradictory" (Kelsen, 1991), but nevertheless necessary and useful for a contingent legal form of life to arise, come perhaps the closest to articulating the paradoxical-reflexive nature of the basic norm. Having argued for decades that the basic norm is a presupposition of juristic thought, and not posited by an act of will, Kelsen now adds: "To the assumption of a norm not posited by a real act of will but only presupposed in juristic thinking, one can validly object that a norm can be the meaning only of an act of will and not of an act of thinking" (Kelsen, 1986, p. 116). He continues: "along with the basic norm, presupposed in thought, one must also think of an imaginary authority whose (figmentary) act of will has the basic norm as its meaning" (Kelsen, 1986, p. 117).[17] This is self-contradictory, says Kelsen, because it contradicts the idea that basic norm authorizes the highest authority. To think of this contradiction as "useful" suggests, however, that the relation between the fictitious will and the fictitious basic norm is circular in the sense of "self-legislation." The unity of the legal system refers to a *collective agent* that is "subject" (or rather a "self") in the two-fold sense of being both the ultimate agent who wills the law into being and the collective of members whose behavior the legal order regulates.

[17] To be sure, already in the Second Edition of the *Pure Theory* Kelsen writes: "Just as we can imagine things which do not really exist but 'exist' only in our thinking, we can imagine a norm which is not the meaning of a real act of will but which exists only in our thinking. Then, it is not a positive norm. But since there is a correlation between the ought of a norm and a will whose meaning it is, there must be in our thinking also an imaginary will whose meaning is the norm which is only presupposed in our thinking – as is the basic norm of a positive legal order" (Kelsen, 1967, pp. 9-10).

Let me clarify this reading incrementally. As is well known, Kelsen's new "skepticism" (see Paulson, 1992a; Paulson, 1998a)[18] as to the role of logic in law was contemporary with a re-appraisal[19] of Hans Vaihinger's philosophy of fiction. In his *Philosophy of the "As If"* (1911), Vaihinger makes the distinction between fictions and hypotheses: "The latter are assumptions which are probable, assumptions the truth of which can be proved by further experience. They are therefore verifiable. Fictions are never verifiable, for they are hypotheses which are known to be false, but which are employed because of their utility" (Vaihinger, 2000 p.xlii; see also Vaihinger, 2000, pp. 266-270).[20] Perhaps Kelsen came to think of his characterization of the basic norm as a "hypothesis" as suggesting too much, as promising something that was not forthcoming, namely verifiability. Indeed, he seems to say as much when he writes:

> [i]t should be noted that the Basic Norm is not a hypothesis in the sense of Vaihinger's philosophy of As-If — as I myself have sometimes characterized it — but a fiction. A fiction differs from a hypothesis in that it is accompanied — or ought to be accompanied — by the awareness that reality does not agree with it. (Kelsen, 1991, p. 256)

One could think that for Kelsen, a legal fiction "has to imply a claim which stands in opposition to the legal order, which cannot be deduced from the legal order" (Kelsen, 2015, p. 13), as he writes in his early, 1919 critique of Vaihinger's thought, but neither ought one think it can be proved in a metalanguage. Instead, as Frederick Schauer suggests, it seems that for Kelsen, "it simply does not matter whether [the basic norm] is true or not" (Schauer, 2015, p. 116). It is not a truth of the legal system the system itself is capable of proving, thereby implying that proving is a task to be conducted at a metalevel. The problem with the formulation of the basic norm as a "hypothesis" could then be seen to be this: it might suggest that "further experience" — or further "parameterization," further construction of metalevels — will be able to prove its truth.

Kelsen's novel characterization of the basic norm as a fiction has not been met with enthusiasm among his readers. As Stanley Paulson, for one, writes:

> the fictitious character of the basic norm amounts to a concession that the normativity thesis [that the pure theory of law is the third way between natural law theory and political theory of law: HL] is not defensible, and the result is the overturning of the Pure Theory of Law as we know it from Kelsen's classical period. (Paulson, 1992a, p. 270)

[18] Kelsen has also famously been accused of "irrationalism" (Weinberger, 1981) in his late thought in which he questions the applicability of the principle of the excluded third to legal norms (but not to legal propositions of legal science) (Kelsen, 1973).

[19] Kelsen had written on Vaihinger's philosophy of fiction already in 1919 (Kelsen, 2015).

[20] Vaihinger also distinguishes between legal hypothesis and legal fiction, or "conjecture" and "invention" (Vaihinger, 2000, p. 32).

Paulson regrets Kelsen's change of heart and sees it as undermining what is unique in the pure theory (Paulson, 1992a, p. 273). Although the paradoxico-critical reading of Kelsen goes beyond the very letter of his work, structuring the different phases of his work with the concept of the metalogical choice at least has the benefit of spinning Kelsen's late thought into an alternative framework, rather than simply seeing it as a failure.

One can nevertheless ask whether the notion of fiction is a better choice to characterize the basic norm than hypothesis, even if it expresses the fact that no proof is coming for it. Robert Alexy is among those who argue in the negative:

> a further basic norm would have to be invented to empower the fictitious authority to issue the basic norm, which would amount to not only denying the original basic norm its character as a basic norm, but also — since the further basic norm, too, could only be the content of an act of will — presupposing *ad infinitum* further fictitious authorities and the fictitious basic norms empowering them. (Alexy, 2002, p. 111; see also Stewart, 1986, p. 132; Duxbury, 2007, p. 9.)

However, the infinite regress arises only for a non-reflexive theory of the basic norm. If the "fictitious authority" is understood simply as *the legal collective itself*, that is, if the basic norm is understood reflexively, the fiction of the willed basic norm expresses the idea of *collective self-empowerment*, and no regress arises. What we do have instead is self-reference and an inconsistent closure, but as Kelsen and Vaihinger both suggest, some inconsistencies may indeed be "useful."

The plausibility of the reading that the "fictional authority" is the legal collective as a whole finds some grounds from Kelsen's early discussion of Vaihinger's book (Kelsen, 2015). Kelsen argues that the only genuine legal fictions are the fictions used in legal cognition (and there are no genuine juridical fictions in legislation or adjudication, contrary to what Vaihinger claims), and his example is the legal person, both in its singular and collective meanings. The legal person is a personification of a complex of norms, and as such a cognitive construct of — response to — the available legal material. It is, for Kelsen, "an auxiliary construction of legal thinking" (Kelsen, 1967, p. 292), and as such it does not directly correspond with anything in positive law, nor for that matter in empirical reality. This implies "logical untenability," but this abnormality "does not militate against its actual practicability" (Kelsen, 2015, p. 7).

"After all," Kelsen writes, "legal science — as cognition of a particular object — can only be possible if one assumes the *sovereignty of the law* (*or, which is the same, of the state*), i.e. if one takes the legal order as an independent system of norms which is not dependent on any higher order" (Kelsen, 2015, p. 18, partly my emphasis). To the legal order corresponds a legal collective that Kelsen identifies with the state or, in another text, with "the People." No legal collective preexists its legal order. Kelsen warns of "the danger that comes with any personification: its hypostatisation into an

actual object of nature" (Kelsen, 2015, p. 8).[21] As a "fiction," the legal person in its collective meaning as the state or the legal collective is not a natural entity, "a real being" (Kelsen, 1967, p. 291) that could be directly perceived or that could actually will something. It can only be accessed indirectly, namely as the fictitious agent or the "acting subject" to whom the acts of legal authorities can ultimately be imputed.

This interpretation gains additional support from Kelsen when he writes, already in *Vom Wesen und Wert der Demokratie* (1920/1929) (*The Essence and Value of Democracy*), that although the idea of "the People" is of utmost importance for democracy, as a political notion it cannot be sociologically observed. This is because, empirically speaking, its unity as a collective dissolves into "national, religious, and economic differences" and "the People" succeeds in only "represent[ing] more a bundle of groups than a coherent, homogeneous mass" (Kelsen, 2013, p. 36). "Here," he continues:

> one can speak of *unity only in a normative sense*. As a consensus of thoughts, feelings, and wills and as a solidarity of interests, the unity of the People is an ethical-political postulate. National or state ideology asserts the reality of this postulate by way of a *common, no longer questioned, fiction*. At bottom, only a juristic fact is capable of circumscribing the unity of the People with some accuracy, namely: *the unity of the state's legal order* whose norms govern the behavior of its subjects. (Kelsen, 2013, p. 36, my emphasis.)

Kelsen reminds that a "person never belongs completely" to the social, or for that matter, state legal order, but that order regulates "only very specific aspects of the individual's life" (Kelsen, 2013, p. 36). Because of this gap between life and its legal regulation (which also forms an important dimension of freedom for Kelsen), the notion of the political collective as a unity is a "fiction": it does not correspond to anything in the world. It has no "being." It is simply a scheme of interpretation, one could say, that allows for legal interpretation of a multiplicity of behaviors as attributable to the legal order. "The People" is not "as is often naively imagined, a body or conglomeration as it were, of actual persons," but it is a juristic fiction, a form that gathers a "multiplicity of human actions [...] as the content of the norms making up the [legal] order" (Kelsen, 2013, p. 36). This unity, then, "is merely a system of individual human acts regulated by the state legal order" (Kelsen, 2013, p. 36). For Kelsen, collective unity is clearly an effect of the articulation of legal norms into a system: a multiplicity of human behaviors can be interpreted as a unity *if* it is seen through the lens of the legal order.

Similarly, in the politically active sense "the 'People' does not actually exist as a viable political force prior to its organization into parties," Kelsen argues (Kelsen, 2013, p. 40). He seems to think that "the people," the *constituent* power in a democracy, only exists as the reference point of *constituted*, legally regulated power, as that collective agent in the name of which all political parties ultimately claim to act.

[21] This, from Kelsen's perspective, is the error that Carl Schmitt makes in his constitutional theory (see e.g. Lindahl, 2007a).

In his later work Kelsen comes back to the jurisprudential fiction of the legal person and the state as such a person and its relation to the legal system. "[T]he problem of the state as an acting person," he explains, "particularly as a person fulfilling legal obligations and exercising legal rights — is a problem of attribution" (Kelsen, 1967, p. 291):

> From the point of view of cognition directed toward the law, only a function determined by the legal order — that is a legal function in the narrower or wider sense of the term — can be comprehended as a function of the state. Since the attribution of a function determined by the legal order and performed by a certain human being to the state as a person is only a way of expressing the idea that a function is referred to the unity of the legal order which determines this function, any function determined by the legal order may be attributed to the state as the personification of this legal order. (Kelsen, 1967, p. 292)

The state can be represented by individuals on the condition that they are empowered in their acts by the legal order. In this way, the acts of will by legal authorities can be attributed to the state as their ultimate agent.

Understanding this account of attribution in reflexive terms takes it one step forward. If the basic norm is a scheme of interpretation that allows the retroactive understanding of the constituent political act as a legal act, then the fiction of the authoritative act of will that posits the basic norm is the fiction of the legal collective, of "the people," to whom the actual act of positing the constitution is, retroactively, imputed. The fictitiously willed basic norm expresses the *self-empowerment* of a legal collective, the legal collective's giving to itself its own legal order. As we have seen, Kelsen's problem is to explain how it is possible to see the historically first constitution as legal. The fiction of the basic norm is an attempt to solve this problem: if legally cognized, the first constitution appears *as if* it was an application of law, and not simply its creation. The fiction of the highest authority is, for its part, a fiction of a collective *in the name of which the individuals enacting the constitution can come, retroactively, to be seen to have acted*. As Vaihinger writes, "[i]n the *fictio juris* [...] something that has not happened is regarded as having happened" (Vaihinger, 2000, p. 34).

In his *Force of Law*, Derrida famously discusses Montaigne's characterization of "legitimate fictions" as law's artificial supplements to natural law. He cites Montaigne:

> Even as women, when their naturall teeth faile them, use some of yvoire, and in stead of a true beautie, or lively colour, lay-on artificiall hew [...] embellish themselves with counterfeit and borrowed beauties; so doth learning (and our law hath, as some say, certaine lawfull fictions, on which it groundeth the truth of justice). (Montaigne, 1933, p. 970, cited in Derrida, 2002, p. 240.)

Montaigne compares law's legitimate fiction to women who resort to artifice when their natural beauty grows old: positive law, an additional, fictional, non-natural justice, comes to supplement the natural law. For Derrida, the supplement, as we saw above, is no mere addition or substitute; rather, it is the only way to claim access to what is "natural" and "prior" to the emergence of the artifice itself. Kelsen's conviction is that law is nothing natural, and that no act of will is directly, without "the supplement" of legal cognition able to count as an act of law-positing. The fiction is, in the end, nothing more mystical than legal signification itself, that is, a name for a contingent legal perspective of reality that neither simply mirrors it, nor simply constructs it. The fiction as an auxiliary construction is a supplement in Derrida's sense: something that comes second, as a response, to political facts and brings out, for the first time, what they already claim to possess.

Pace Paulson (1992a), then, Kelsen's reference to "figmentary will" does not necessarily mean that his late position would now suddenly be equivalent to the same will theories of law, like to Austin's theory of law as the pure command of the sovereign, that he earlier so vehemently criticized. Although underdeveloped, his idea of the auxiliary fiction fits with the idea of legal signification so important to him during his whole oeuvre, if read with the paradoxical temporality of retroactivity in view.

That Kelsen would write already in 1919 that "we have to speak of a fiction as soon as cognition (and especially juridic cognition) takes a detour in knowing its object (and in juridic knowledge this object is the law, the legal order, the legal ought), a detour in which it consciously sets itself in contradiction to this object; and be it only in order to better grasp it" (Kelsen, 2015, p. 5), suggests that Kelsen was from the beginning seeking to express his pure theory as a reflective philosophy. Legal cognition does not simply "present again" what is already the case in positive law. In this sense, it does set itself as if against the fact of law. However, this does not mean that legal cognition merely imagines something completely detached from the law. Rather, it seeks to grasp the law itself. It seeks to make explicit what is implicit in law, and what is implicit, can only be seen as having been there all along after it has been made explicit. The logic of the supplementarity of origin is an attempt to express this ambiguity in self-reflection: what is original comes to its "true" meaning only in an auxiliary fiction.

The basic norm as a fictional norm willed by a fictional authority can, thus, finally be understood as the fiction of the *finiteness of a contingent perspective of a legal collective to reality*, as the presupposition that a closure has been made that allows for legal signification, the interpretation of (political) authoritative acts as legal acts imputable to the collective as a whole and, therefore, valid and objective. Finitude and closure make it possible to resolve social conflicts as legal conflicts, and thereby avoid the paralysis suggested by Wittgenstein's paradox. However, the price to pay is the inclosure paradox: the limits of law cannot be drawn in a consistent, fully rational and objective manner. They cannot be secured from a neutral, detached perspective, but they are reflexive and inconsistent. For this reason, because positive law is unable to fully validate itself in the only operation of validation available to it, the distinction

between mere power and legal power, between coercion and valid coercion, between politics and law, between subjectivity and objectivity, cannot be made as neatly as Kelsen would have wanted. "*Gewalt*, then" as Derrida reminds, "is both violence and legitimate power, justified authority" (Derrida, 2002, p. 234).

How ought, then, a legal collective deal with its contingent limits? On the one hand, some limits must be drawn in order for that particular juridical perspective of reality to arise: some political acts must be seen as valid acts of law-making. On the other hand, the collective cannot legitimate the limits it draws in a fully consistent way. A legal perspective is nothing but a contingent, non-necessary perspective of social reality (and this is, of course, not nothing). Its post-metaphysical self-referentiality closes off effective ways of fully rationalizing and objectifying its contingent limits. All this implies that novel ways of dealing with the ambiguity of the limits, and the reduction of alternative ways of interpreting the facts that legal signification implies, must be considered, if legal collectives are not simply let off the hook with their inconsistent contingency.

For if it is so that the limits of the legal collective and its legal order are inconsistent, so that they cannot be fully legitimated, then this means that the outside is already and irreducibly inside, that politics is within the law, and mere coercion within the valid coercion. If legal theory and legal signification are responsive, they begin in what is other to them, in politics and the norm-claim that is not yet, and perhaps never will be, a legal norm. For this reason, then, the pure theory is never, not exactly, *pure*, uncontaminated by its other. Therefore, it is also not possible to say to the anarchist, as Kelsen does (Kelsen, 1967, p. 218), that she is, pure and simple, outside the game of law. The paradoxical *hypothesis* (in its Greek meaning of "foundation," "that what lies under the thesis"), the *arkhē* (which means both "beginning, origin" and "rule, authority"), is always already accompanied and undermined by its constitutive other, the *anarkhia*. To this problem and its many implications we will return.

3. The art of not being paralyzed: Niklas Luhmann's evolutionary theory of legal paradox

3.1 Introduction

In this chapter, I argue that Niklas Luhmann presents a constructivist-evolutionary theory of paradox. According to Luhmann, social systems, such as the legal system, deal with their fundamental paradox by "unfolding" it, by inventing new distinctions that seek to hide the paradox in socially adequate ways. At stake is nothing less than the very self-reproduction, or evolution, of the system. To preserve themselves, systems need to get creative in seeking to direct their attention, as well as the attention of their audience (their social environment), away from their paradoxical nature.

Furthermore, I will argue that although Luhmann presents his sociology of paradox and its creative potentialities as an alternative to Jacques Derrida's take on paradox, his account of how the "deparadoxification" functions follows, in fact, the paradoxical logic of the supplement. Unfolding the paradox itself is a paradoxical temporal process. Several scholars have paid attention to Luhmann's and Derrida's different orientations to paradox (see e.g. Teubner, 2001b; Teubner, 2006; Clam, 2006; Kastner, 2006; Stäheli, 2000; the essays in Teubner, 2008b). Günther Teubner, for one, draws the distinction between systems theoretical and deconstructive orientation in the following way:

> Luhmann aims at a productive deparadoxification in the immanence of institutions and constructs a world of legal system's autopoiesis that reacts to crises in its environment with the impulse: "Draw a distinction!" Derrida's thought, by contrast, aims at transcending them [institutions] by reparadoxification and creates an alternative world of *différance* in which the deconstructive double movement uncovers constantly the institutions' foundational antinomies and the resulting paralysis, but also simultaneously requires that the concrete routines of decision-making are broken within the law: "*l'intensification maximale d'une transformation en cours*." (Teubner, 2008a, p. 4, my translation.)[22]

[22] "Luhmann zielt auf produktive Entparadoxierung in der Immanenz der Institutionen und konstruiert eine Welt der Autopoiese des Rechtssystems, die auf Umweltkrisen mit dem Impuls reagiert: 'Draw a distinction.' Derridas Denken dagegen zielt auf ihre Transzendierung durch Reparadoxierung und entwirft eine Gegenwelt der différance, in der die dekonstruktive Doppelbewegung permanent die Gründungsantinomien der Institutionen und die daraus resultierende Paralysierung aufdeckt, aber zugleich die befreiende Durchbrechung der konkreten Entscheidungsroutinen im Recht verlangt: 'l'intensification maximale d'une transformation en cours'."

While it is illuminative to pit Luhmann's certain "conservativeness" against Derrida's "radicality," my aim in this chapter is to participate in this discussion by applying to Luhmann's work the mapping of orientations to paradox. This will allow us to see how Luhmann's theory of paradox is situated within formal thinking of law and politics more generally. Although Luhmann is not, as we will see, a traditional constructivist as he does recognize, unlike Russell for example, the *ineliminability* of paradox, he nevertheless prefers to observe how systems strive for consistency in order to remain functional. It will be the guiding thread of this chapter to observe how the legal system, according to Luhmann, unfolds its paradox, and how the way in which it does this is itself paradoxical.

As we will see in the present and following chapters, Luhmann's position could be characterized as "paradoxico-evolutionist" rather than paradoxico-critical: he acknowledges that social systems are foundationally paradoxical, but emphasizes the way in which they use the paradox and critique for the benefit of self-maintenance in always new societal situations.

Luhmann's work, and the scholarship commenting on it, is vast. I will be faithful to Luhmann's maxim that everything begins with "drawing a distinction" and read his complex work only very selectively. I will, for example, leave aside his more empirical-historical work on the evolution of social systems and will not enter into controversies of evolution theory more generally. I will focus on a key formal notion — paradox — in Luhmann's writings on communication systems in general and the legal system in particular and reconstruct his abstract theory of the evolution of communication systems from the perspective of deparadoxification.

The chapter begins with an overview of my argument that Luhmann presents a constructivist-evolutionary theory of (legal) paradox (3.2). It then goes on to reconstruct in greater detail the evolutionary theory of communication systems, the legal system included, as unfolding of the paradox (3.3). After that, I seek to show how Derrida's (non-)concept of supplementarity figures in Luhmann's theory of law and the legal system's unfolding of its paradox and discuss Luhmann's account of law as society's immune system (3.4). In the last section (3.5), I wrap up my reading of Luhmann's theory of legal evolution as deparadoxification. My discussion of Luhmann continues in the next chapter, which begins with remarks on the status of conflict, critique and politics in Luhmann's systems theory.

3.2 The art of civilizing the paradox

3.2.1 Constructivist orientation to paradox rethought

Luhmann has a particularly acute sense of the ambiguous significance of paradoxes for societal communication. On the one hand, social subsystems — law, politics, science, religion, economy, art, education — are, for him, constitutively

paradoxical. The paradoxes at the heart of systems using a binary code, like legal/illegal (lawful/unlawful, *recht/unrecht*), cannot be eliminated in the sense logicians have traditionally thought. On the other hand, Luhmann sees in Russell's and Tarski's attempts at parameterization examples of a more general strategy of "unfolding the paradox" that is repeated in different social systems (Luhmann, 1995b, p. 46; Luhmann, 1988b; see also Löfgren, 1978). The theorist ought then, Luhmann argues, not simply stand in awe before the paradoxical foundation of orders, which is what Luhmann accuses deconstruction of, but observe the unfolding of the paradox of the binary code as a mechanism in the evolution of social systems (Luhmann, 1991, pp. 58-59).

Recall Russell's solution to the paradox of a self-referential set: "Don't look at the paradox! Look at this *new* distinction (reformulated set theory) instead!" For Luhmann, such creative constructions of new distinctions is a way of "deparadoxifying" (Luhmann, 1995b, p. 47; Luhmann, 1995a, p. 33)[23] the paradox within the respective system (science) that can be observed (by the sociologist, for example, or by logicians themselves) as the system's evolution. This does not count as a *solution* to the paradox, but as the successful continuation of scientific communication temporarily paralyzed by the paradox. Whether new distinctions succeed in what they are attempting, that is, in getting scientific communication over the paralysis, depends on their reception within the system, that is, whether the scientists indeed begin to look the other way and work with the new distinctions.

According to Luhmann's own categorization, there are three possible positions to paradox that Luhmann names by recalling the myth of the dreadful Gorgon sisters. The first is to view the paradox, with Frege and Russell, as the mortal Medusa and, thus, eliminable. In my terms, this is the classical constructivist view that sees no alternative to understanding totality as consistent, thus requiring that a solution to paradox be found. The second is to stand in awe, with Nietzsche, Heidegger and Derrida, before the immortal, fascinating Stheno, enjoying the thrill of looking at her horrifying face. This "sthenography," or paradoxico-criticism in my categorization, has achieved a sea-change, Luhmann argues, in the philosophy of the paradox by moving from the elimination of paradox to its admiration: it has brought about a "paradoxification of civilization" but not, however, a "civilization of paradox" (Luhmann, 1991, p. 60). Such civilization is what Luhmann attempts to observe. The paradox can take the form of Euryale, who is immortal, like Stheno, but whose face we need to, and can, learn not to look at. A foundational paradox, if exposed, halts communication, which implies that it needs to be dealt with in some way, de-paradoxified, so that communication can go on. "Euryalistics" is then the science of the art of not being paralyzed by the presence of a paradox (Luhmann, 1991, pp. 71-72). Euryalistics is an *evolutionary theory of autopoiesis*, of the system's self-reproduction through continuous actualization of new operations and distinctions, with the constitutive paradox as its engine.

[23] In German *Entparadoxifizierung,* translated also as "de-paradoxicalization" or "de-paradoxication."

Thus, Luhmann does not exactly fit into Livingston's mapping of orientations to totality and paradox that we discussed in the Introduction. Luhmann accepts from the classical constructivist position the need to externalize, to change perspective in order to break the short-circuit produced by the paradox. Unlike Russell, Tarski and other philosophers of "parameterization," Luhmann does not, however, claim that the paradox would thereby be strictly speaking dissolved. It is rather *only displaced* to another distinction that may, or may not, work for a while in allowing communication to go on. Luhmann is not interested in solving logical puzzles but observes instead how social systems manage their foundational paradoxes so that they need not to confront them. Social evolution is, for him, paradox management. In his insistence on the final uneliminability of the paradox, Luhmann's position is close to the paradoxico-critical orientation. However, his is an evolutionary theory of the paradox, and Luhmann observes critical reparadoxification as a trigger for further creative systemic evolution. For him, a paradox is not really a site for political conflict over the "common." Just like with other constructivists, Luhmann's focus on deparadoxification makes his theory of the paradox profoundly conventional in the sense that he sees deparadoxification as an important mechanism in the evolution of social systems but does not consider the paradox of law as a site of political critique and conflict over "the common form of life."

3.2.2 The paradox of the legal system

The fundamental paradox of social subsystems is that "of *a binary code applied to itself*" (Luhmann, 1988c, p. 154, my emphasis). The legal system, like all social subsystems, is based on a binary code or a guiding distinction. Using the code *legal/illegal* allows the legal system to distinguish itself from its "environment," which includes other social subsystems as well as living systems and systems of consciousness, and everything else that lacks relevance for law. For this reason, dealing with the problematic self-reference of the code — is the distinction between legality and illegality itself legal? is the framework for distributing justice itself just? — is essential for the continuity of the legal system's functional identity and autonomy as well as its continuous relevance in the functionally differentiated modern society. Indirectly it is significant also for the maintenance of the functionally differentiated society itself.

The code legal/illegal is the basic "frame (or scheme) of observations" (Luhmann, 1993a, p. 764) of the legal system (note the similarity of formulation to Kelsen's account). It is by coding events in its environment and within itself as legal or illegal that the system observes the world and itself. The code forms the basis of the legal system's social function, which is to deal with social conflicts by deciding which of the parties in conflict has legitimate normative expectations of what ought to be done. The legal system does not decide what is true or untrue (this is the code of the system of science) nor, say, who has money and who is poor (possession/non-

possession is the code of the economic system), but is trusted by other systems to say who is, legally speaking, in the right and who is in the wrong. Law "observes" its environment through its code. To give an analytically specific account of the concept of observation, Luhmann notoriously draws from the British logician George Spencer Brown's calculus, or protologic[24], developed in *The Laws of Form* (1969). What Spencer Brown calls a *form* consists of a distinction between two sides and an indication of one of those two sides (Spencer Brown, 1972, p. 1). Drawing a distinction establishes a boundary: "As a result, we have two sides; however, they are subject to the condition that both of them cannot be used simultaneously" (Luhmann, 2006, p. 43). If the distinction is to make any sense at all, one of the sides that the distinction has made emerge must be preferred at the expense of the other (Luhmann, 2002b, p. 74). For Luhmann, then, "observation [is] the use of a distinction for the purpose of indicating one side and not the other" (Luhmann, 2000, p. 59). A form encompasses "an inside," the indicated side of the distinction, and "an outside" that "is a nameless residual, an unmarked leftover, from which the marked side is delineated" (Schiltz & Verschraegen, 2002, p. 58).

A distinction is, Luhmann argues, a unity of two sides only one of which is preferred. It is a *unity* in difference — the code legal/illegal, as well as the distinction law/non-law, contain two sides — but it has operative value only as a *distinction* (see Luhmann, 1995a, p. 20). Something can be observed now as legal or illegal, but it would be uninformative to try to observe something as both legal and illegal at the same time (what is now legal can, of course, be observed as illegal in the future, if the law changes). Each observation thus requires preference of one of the sides over the other (Luhmann, 2012, p. 29). In drawing a distinction, there is both structural simultaneity that encompasses both sides (this pertains also to the distinction system/environment) and operational sequentiality that implies asymmetry of preference. Formally speaking, a paradox is then an operational simultaneity of the two sides and a situation of being unable to prefer only one of the sides. The legal system enters into a state of inoperativity if it tries to decide, by using its code, if this code is itself legal or illegal. It will be inconsistent if it has to say that "the illegal is the

[24] Jean Clam's observation of Spencer Brown's, and Luhmann's, theory of form in relation to more traditional forms of logic is illuminative: whereas classical logic includes, among other things, a theory of enunciation and inference and a formal body of theorems, "Spencer Brown's program is an inquiry into the pre-discursive laws emerging with the most elementary position of 'something.' These laws must be situated at a level preceding the level of expression grasped by classical logic. Protologic denotes, thus, in our context, the logic implied in the most general act of appearance or position of a something (a form). […] The form, as it is understood by Spencer Brown, is prior to anything logic can thematize at its own levels of generality" (Clam, 2000, pp. 68-69). Luhmann also calls the theory of form "prelogical" (2000, p. 28). Dirk Baecker notes that the fact that sociologists, obsessed by understanding social differences, are intrigued by mathematics is not, perhaps, so strange after all. For they can "learn from mathematical equations how to treat the different (the two sides of the equation) as identical (with respect to the equal sign)" (1999, p. 1). Furthermore, "[a]ll mathematical achievements are devices that bear witness to the peculiarities of communication" (Baecker, 1999, p. 2). This is also what Kripkenstein, in its naivety, also hints at. Equations as operations are also communications in the system of science. For Baecker, Spencer Brown's calculus "exhibits all the strengths of mathematical computation, yet at the same time captures communication's capacity for, and anchoring in, ambivalence and ambiguity" (Baecker, 1999, p. 2). It is thus perhaps worth the trouble to think about the significance of the abstract theory of form for the paradox of law.

legal" or "the legal is the illegal." As we saw in the previous chapters, if the operation that uses the code legal/illegal is applied to itself, we ultimately end up at a point that is undecidably both legal and illegal: a paradox.

The problem for a system functioning on grounds of a binary code arises with the elementary critical question: "What, then, about the right or the wrong to decide about right and wrong? How is it that somebody has the right to say that a position or an opinion is wrong?" (Luhmann, 1988c, p. 154) At stake in the response to this critical question is nothing less than finding an answer to the question: "How can a society enforce a binary code?" (Luhmann, 1995b, p. 155) The difficulty is that the system must answer this question in other than simple self-referential terms, that is, it must not be tautological ("it is right because I say it is right") nor inconsistent ("it is undecidably both right and wrong"). Such classical answers of legal theory to the question concerning the legitimating ground of society's legal order as the social contract, natural law or democracy are all, in Luhmann's parlance, attempts at unfolding the paradox, seeking a third term that would provide a way out of the code's inconsistent self-reference.

However, as we already saw, Luhmann's suggestion as to how the legal system evades the paradox is not a classical constructivist one of identifying the final metalevel that would secure the consistency of the legal order. He does not analyze the legal system in normativist terms, seeking law's final legitimizing (moral) grounds. He is a post-metaphysical thinker for whom "the point from which all further investigations in systems theory must begin is not identity but difference" (Luhmann, 1995a, p. 177). In the beginning, if such a term can be used at all, is the *unity of a distinction*, and therefore a paradox, not a self-identical, fully consistent entity. Furthermore, Luhmann observes the legal system in the dimension of time as a dynamic social system, and the paradox appears, so observed, as a trigger of *legal evolution*.

> There are paradoxes everywhere, wherever we look for foundations. The founding problem of law, then, is not to find and identify the ultimate ground or reason which justifies its existence. The problem is *how to suppress or to attenuate the paradox* which an observer with logical inclinations or with a sufficient degree of dissatisfaction could see and articulate at any time. (Luhmann, 1988c, p. 154, my emphasis.)

The attempt is not to logically eliminate the paradox for good. Instead, Luhmann observes sociologically how observers (systems) deal with their foundational paradox of the self-referential code by seeking to find new distinctions that would successfully hide the paradox, at least for the time being. The measure of success of this endeavor is nothing other than the fact that the system's communication and autopoiesis continues, without being paralyzed by the observation of the paradox. It is not the task of the sociological systems theorist to solve paradoxes, but to observe how systems evolve by unfolding, invisibilizing, the paradox at their heart.

The societal aim of deparadoxification in the legal system is to "unask the question" (Luhmann, 1988c, p. 154) concerning its sovereign right in society to judge what is right and what is wrong, to prevent this "third question"[25] from arising and rendering the legal system inoperative. Deparadoxification seeks to make the societal conditions benign for the continuation of legal communication. Paradox is the name for the *lack of necessary foundations of a social system* that understands reality through its own leading distinction (its code), without ever being able to fully justify the gains and the losses that the use of this filter implies. Deparadoxification is the system's attempt to "cheat" (Philippopoulos-Mihalopoulos, 2006): to create the appearance of itself as rational, consistent and grounded in the eyes of society, and thereby to preserve itself.

3.2.3 The evolution of communication systems as unfolding of the paradox

Luhmann's "evolutionary" theory of paradox aims at "transfor[ming] a logically insoluble problem into a genetic one" (Luhmann, 2012, p. 251). "Evolution theory," he explains:

> shifts the problem to time and attempts to explain how it is possible that ever more demanding and ever more improbable structures develop and function as normal. The basic proposition is that evolution transforms low probability of origination into high probability of maintenance. (Luhmann, 2012, pp. 251-252)

From this evolutionary perspective, the paradox of the binary code implies the logical situation of "explosion," that is, the principle of *ex contradictione quodlibet* (from the contradiction, everything follows) (see 1.2.2). A paradox is "the world as a frameless, undistinguishable totality that cannot be observed" (Luhmann, 1993a, p. 775). A paradox is "an entity without connective value" (Luhmann, 1993a, p. 769). By contrast, communication is about connecting one communication with another, thereby entrenching a certain selection of what is informative in the world, at the exclusion of the uninformative. A paradox is a non-selection and therefore a jam in communication; it indicates inoperativity and undecidability, the inability to choose between the legal and the illegal. It is something that is excluded by normal legal communication, which always prefers the one or the other. Paradox, thus, is the name for an observation of uninformative complexity, an observation of "the unity of a manifold" (Luhmann, 2012, p. 78, emphasis omitted).

In Wittgenstein's paradox of rule-following, any choice of conduct is possible, and a rule forfeits its function of selecting the correct conduct if its application and

[25] I capitalize this expression in the following to emphasize critique as the site of disclosing the paradoxical foundations of a social system/order.

correct following cannot in some way be indicated and secured (at least for the time being). Similarly, for Luhmann, the very operation of the legal system is paralyzed if the paradox of the self-referential code becomes observed as such. This makes selection necessary, even if selections never have any ultimate justification and cannot be proved "correct." It is possible to observe how a rule "explodes," how it is a unity of all the manifold, possible ways of applying and following it, but in its actual operation such complexity is "reduced" to a manageable level. Once the legal system is in place and operation, it *will select* between correct and incorrect following and application: such selection is the normal state of the system, the explosion the abnormal.

We can thus observe in the Wittgenstein/Kripkenstein paradox, if interpreted from a Luhmannian perspective, a failure of communication and a situation of paralysis. Given the multiplicity of equally possible mappings from a set of facts to different meanings, how is successful communication possible? This would be a Luhmannian question. The formulation of the paradox could be seen as suggesting a "contra-phenomenological effort [that] view[s] communication not as a phenomenon but as a problem [...] we must first ask how communication is possible at all" (Luhmann, 1981, p. 123). For Luhmann, successful communication is indeed not a given but improbable, "despite the fact that we experience and practice it every day of our lives and would not exist without it" (Luhmann, 1981, p. 123). Since there is no natural meaning, how is meaningful communication nevertheless possible? Besides asking, with Kant (and Kelsen), after the conditions of possibility of (legal) knowledge, practical reason and aesthetic judgment, Luhmann insists on the necessity of asking about the conditions of possibility of social order (Luhmann, 2002b, p. 315). His sociological answer is a theory of the evolution of communication systems.

"All recognizable order is based on a complexity that demonstrates that things could be otherwise" (Luhmann, 2012, p. 79). Social systems are contingent, historical systems without necessary and sufficient reasons: they create social order and thus "reduce" complexity (some facts come to count as illegal in exclusion to others). This reduction is not without alternatives, could be done otherwise, and is consequently itself complex. Luhmann observes society from his sociological perspective in evolutionary terms, how relatively stable social systems have emerged that allow certain stable forms of communication to operate. He cites as an achievement in the evolution of communication systems that we, rarely, in fact, find ourselves in such situations as described by the Wittgenstein/Kripkenstein paradox. Luhmann's problem is not the classical philosophical-skeptical doubt about the possibility of knowledge but rather how to "explai[n] the normal as improbable" (Luhmann, 1995a, p. 115). As a sociologist, Luhmann is not a skeptic but "assume[s] that there are systems" (Luhmann, 1995a, p. 13) and "analyze[s] real systems of the real world" (Luhmann, 1995a, p. 13). He studies the system of society and its subsystems as enabling "the transformation of the improbable into what may be routinely expected" (Luhmann, 1981, p. 128).

Luhmann, therefore, sees the unfolding of the paradox in the context of his research on the evolutionary improbability of communication and processes of normalization of behavior. The paradox has been unfolded, if it can be observed that

the situation of explosion is improbable and abnormal: "If meaningful communication becomes possible at all, every specific utterance being equally probable at every specific point in time becomes improbable" (Luhmann, 2012, p. 253). The more probable the continuation of normal communication, the less probable the observation of the paradox of the code becomes. A social system that offers relatively stable patterns of normalized behavior — "a form of life" — offers itself as an answer to the threat of explosion. Or rather, the sociological observer can observe it as unfolding of a "mythical" situation of the explosion (see Stäheli, 2000, pp. 47-48) — "mythical" insofar as one observes a normally functioning communicative system as more probable than the emergence of an inoperative paradoxical situation. The paradox has been, in a sense, normalized away.

However, it is of course always possible to observe that a social system using a binary code is based on a paradox. This is at all times possible for anyone with a "sufficient degree of dissatisfaction" with the system, as Luhmann puts it in the quotation above. The re-emergence of the Third Question thus remains *a risk* for the system. But Luhmann accepts the classical logical position that paradoxes "have to be replaced with stable identities," inconsistency with consistency, insofar as he sees this as necessary for the emergence and maintenance of successful and temporally continuing communication (Luhmann, 1993a, p. 770). Luhmann borrows the concept of "unfolding the paradox" from the Swedish cybernetician Lars Löfgren (Luhmann, 1988b, p. 28). Löfgren, for his part, follows Tarski's distinction between object language and metalanguage and argues that this distinction can also be maintained for general systems, where the introduction of the metalevel "unfolds" the paradoxical self-reference of the system. Unfolding self-reference means "explaining" it by taking ascending steps, each of which expresses the foundations of the lower formal area incapable of itself expressing them consistently, without paradox or tautology. Like for Tarski, for Löfgren, the unfolding implies the restriction of free self-reference and prevents the properties of the observer from entering into the descriptions of his observations (Löfgren, 1978, pp. 243-244).

The concept of unfolding the paradox thus seems to indicate the metalogical choice in favor of incompleteness of the formal system the consistency of which is explained, and inconsistency unfolded, by subsequent metasteps. As noted, in distinction to Russell and Tarski, Luhmann argues that unfolding the paradox *does not* mean solving it, so the inconsistency cannot be in any final sense avoided. For deparadoxification is about drawing new distinctions, and every distinction is, for Luhmann, by definition paradoxical (as it is a unity in difference) (Luhmann, 1993a, p. 770). For this reason, every new distinction may at some point in time become visible as a paradox, thereby requiring deparadoxification in its turn: "the paradox, like the sun, passes underground and reappears in the future" (Luhmann, 1988c, p. 159). This construction of new distinctions that temporarily ease the inconsistency of the self-referential system is indeed how systems evolve. What Luhmann, then, thinks he sees when he observes social subsystems and their histories are sequential processes of de- and reparadoxification (Luhmann, 1995b). For example, grounding positive law on natural law functioned for the legal system as a societally effective

deparadoxification mechanism — until it did not. After the reference to natural law became implausible as the answer to the Third Question, the paradox at the heart of the legal system was exposed and a new unfolding became necessary.

In the modern juristic self-understanding, Luhmann writes, "all law is valid law. Law which is not valid is not law. It follows that the rule that makes validity recognizable cannot be one of the valid rules." We already discussed this above in our analysis of Kelsen. "There cannot be any rule in the system that regulates the applicability/non-applicability of all the rules of the system. The problem has to be 'gödelized' by a reference to an external foundation" (Luhmann, 2004, p. 125). *Consistent* self-reference of valid rules is impossible, as self-reference leads to the paradox of the highest rule. This forces, Luhmann argues, the legal system to eject the ground of validity outside itself. For Luhmann, then, the legal system *for functional reasons* makes the metalogical choice in favor of consistent, but incomplete, totality. The deparadoxifying solution *par excellence* in modern society is to eject the ground of validity to the political system. The political system is, from the perspective of the legal system, the metasystem that offers a societally credible answer to the Third Question, to why the legal system is in the right when it decides between right and wrong: the political, extra-legal origins of legal norms break the circle of self-reference. The use of the code legal/illegal is "right," legitimate, because the rules for its use, namely laws, are decided in a political and democratic process. The legal system, then, also reciprocally deparadoxifies the paradox of the political system, namely that of "binding of necessarily unbound authority" by offering the legal and hence "objective" medium for the decisions of the political sovereign. The constitution couples these two systems together in a stable, structural way, and allows them to mutually deparadoxify each other's paradoxes, at least for the time being. Constitutional laws, Luhmann argues, express this reciprocal deparadoxification. They do so, on the one hand, by saying of themselves that they belong to the legal order of which they are the metarule. On the other hand, they refer to an extra-legal authority, in particular that of the people's will, which is what the constitution is said to express. The constitution is a central instrument for unfolding the paradox of the validity of the rule of valid rules. (Luhmann, 2004, pp. 405-410)

Urs Stäheli describes deparadoxification as a *creative moment* that is about making a decision or drawing a distinction without deriving it from the system as it currently stands (Stäheli, 2000, p. 51). The supplement, like the people's will, is understood as something *external* to the system that comes to break the oscillation to which the exposure of the paradox has led. The structural similarity to "parameterizing" solutions to paradox seems clear, but what complicates this assessment is that, for Luhmann, it is the *system* that deparadoxifies *itself* by referring to and coupling with what is external to it. Self-reference is displaced rather than eliminated. The reference to an external metalevel that cannot be derived from the system itself *is made within the system*. It is an internal construction of externality. In Luhmann's terms this is "the paradox of re-entry": the making of the distinction between system and environment in the system itself and as system's description of itself and what is other to it and absent from its autopoiesis (see Luhmann, 1995a, p.

42). The system will form *internally* an understanding of what happens *outside* it, in its environment. What is different (system/environment, self/other) is the same (system, self), and we have a paradox. "The other side remains included, but as excluded" (Luhmann, 1995b, p. 46).

This destabilizes the understanding that the supplement that comes to close the system from the outside is simply external, and this also clearly marks Luhmann's difference from the traditional constructivist position on unfolding the paradox. Law's marking of "the people's will" as something real and external that ultimately authorizes valid law is law's own construction. It is precisely the point both outside and inside the totality: an inclosure paradox. The unfolding of the paradox cannot escape the paradox but rather reconfigures it (see also 3.4 and 3.5 below). As mentioned, Luhmann takes his own theoretical position to be a critical development of the deconstructive position on the paradox. He understands systems theory as already deconstructive in its analysis of systems as "based on" difference (between system/environment, as well as a binary code, like legal/illegal) and takes deconstruction further by "sociologizing" the difference, observing its evolutionary implications (Stäheli, 2000, p. 16). We will see in greater detail below how in order to distinguish his position on the paradox from Derrida's (or rather from what Luhmann understands Derrida's position to be), that is, in order to give an account of deparadoxification as a key part of a theory of paradox, Luhmann uses the deconstructive (non-)concepts of retroactive temporality and the logic of supplementarity that carry the paradox with them. This is no secret: Luhmann openly states that deparadoxification is deconstructible (Luhmann, 1993a, p. 770).

The more important point than a rather superficial comparison between systems theory and deconstruction is that an unfolding of the paradox cannot eliminate the risk of inoperativity that the paradox carries with itself. The unfolding of the paradox of the code as structural coupling with the political system introduces a new distinction (law/politics), which clearly has been a success in the history of the modern state. It has allowed both legal and political communication to continue, while avoiding at least some fundamental critique. That the legal system succeeds in appearing politically legitimate is one central way of creating social conditions in which the legal communication can proceed relatively undisturbed. From Luhmann's perspective, constitutionalization lowers the risk of a wide-spread critique of the use of law (and political power). Let me note here that emerging global legal orders relatively independent from the traditional constitutional structures of legitimation are particularly vulnerable to reparadoxification, that is, they risk facing the critical question concerning their right to deal global justice. This may suggest that constitutionalization as an effective form of legal paradox invisibilization is nearing its end.

What is at stake in the whole problematics of the paradox and its unfolding is the *durable possibility of contingent, historical, artificial, difference-based communication systems to remain in operation despite the fact that there are always alternatives and that these systems always face the risk of critique that re-introduces the excluded alternative*. Deparadoxification is a technical name for a kind of

"immune mechanism" that seeks to protect social systems against their destabilization and, thus, indirectly the functional differentiation of modern society. According to Luhmann, as I discuss in a moment, the legal system functions as an immune system that protects the continuation of the autopoiesis of society by providing the means for managing social conflict. The immune system protects the survival of the autopoiesis of society (and thus ultimately that of the legal system itself, as legal communication is part of societal communication) by responding to the conflict with "adequate complexity," by re-drawing distinctions that the system deems a fitting response to the situation of conflict at hand. The reference to the political system and "the people" is not the only expression of the modern legal system's unfolding of its paradox. In the following, we will see how the operation of the legal system itself can be seen as a continuous deparadoxification.

3.3 Paradox and its unfolding in communication theory

Let us now focus on the basics of Luhmann's general theory of communication. Social order arises, in Luhmann's account, when single events of communication connect with other events of communication. Deparadoxification is an "immune mechanism" that seeks to secure this connectivity.

3.3.1 The paradox of insincerity and the myth of double contingency

What the Wittgenstein/Kripkenstein paradox intimates is the contingency of every selection among interpretative possibilities: there are always alternative possibilities of understanding, interpreting and explaining uttered signs or a situation. Kripke's thought experiment relied on the claim that simply by observing the student's record of past equations (that have a value below 57) it is not possible to say from the outside and based only on "the facts" whether the student understands what she is doing as addition or quaddition (or whatever else). Nor can Kripke defend himself against the crazy skeptic who claims that Kripke can refer to no facts about his past calculations that prove he was using the addition function instead of the quaddition (if his past equations were under the value 57). Kripke's attempts at convincing the skeptic that what he truly meant was the addition function fall on deaf ears. His discussion of the paradox revolves around how it can be objectively shown, and shared, what an individual "privately" means and intends "in her mind."

In contrast, from the Luhmannian perspective, Kripkenstein testifies to the incommunicability of sincerity. Luhmann calls this incommunicability "a general paradox in communication theory," which states that although "[o]ne does not have to mean what one says (e.g., when one says 'Good Morning')[,] one cannot say that one means what one says" (Luhmann, 1995a, p. 150).

> One can easily utter something about oneself, about one's own state, moods, attitudes, and intentions; but one can do this only to present oneself as *a context of information that could also be otherwise*. Therefore communication unleashes a subversive, universal, irremediable suspicion, and all protestations and assurances only regenerate suspicion. [...] The insincerity of sincerity becomes a theme as soon as one experiences society as something that is held together not by a natural order but by communication. (Luhmann, 1995a, p. 150, my emphasis.)

Luhmann's point of departure in his theory of communication is the argument that we are, as singular consciousnesses or "psychic systems," "black boxes" to each other (Luhmann, 1995a, p. 109). Ego has no direct access to alter ego's consciousness. Neither can ever experience the other's experiences, think the thoughts of another consciousness. Psychic systems are *operatively closed* to one another, as Luhmann puts it. This implies that the ego can never be absolutely certain what the alter "means" or "intends" in her mind. Even "communication permits no access to the other's interiority" (Luhmann, 2000, p. 12). My (ego's) experience of what the alter means or intends, is irreducibly just and only that: *my* experience of *her* intention. My experience is, thus, *indirect*, colored by my expectations concerning the way she orients herself toward the world, and me, around her. For alter, the situation is similar, and ego experiences alter as such, as an alter *ego*. As King and Schütz aptly put Luhmann's point:

> all that is visible for one system (A) [e.g. me, the ego; HL] is the way that the other system appears to deal with the external environment. What is invisible to A is the selectivity of the other system (B) [e.g. alter's actual experience of a situation or event, how she intends it in her consciousness on grounds of her past experience of similar situations; HL]. It has no way of seeing the way that B interprets the external environment (including A itself) except by the use of its (A's) own selectivity. (King & Schütz, 1994, p. 272)

That we cannot experience each other's experiences and think each other's thoughts already makes it improbable that "one person can understand what another means" (Luhmann, 1981, p. 123). It is one of the reasons why communication is improbable. It is also what makes sincerity incommunicable. Alter's/communicator's self-referential communications about what she means when she says something ("I meant the addition function in my past arithmetic exercises, and not the quaddition") do not make the black box any "whiter," because also alter's self-referential communications depend on her own selectivity that remains invisible to ego/understander. Past facts about a set of calculations do not make the calculator's intention transparent, nor do the calculator's expressions about them. Self-referential communications do not make present and visible the intention about which they communicate; they *re*present something that remains invisible by communicating it as *this* kind of an intention rather than *that*. In other words, they come with a horizon

of other possibilities of interpretation, with "a context of information that could also be otherwise": they are complex, which implies the risk of misunderstanding. This also applies to communicating sincerity ("I really meant what I said"), which leaves open the possibility of insincerity about sincerity. (The partner can, of course, choose to ignore this possibility and believe the communicator, but the irreducibility of the horizon of other possibilities suggests that such belief is risky and may turn out to be unwarranted.) "I don't know if I mean what I say," says Luhmann (verging on the performative contradiction). "And if I knew, I would have to keep it to myself" (cited in Moeller, 2006, p. 9).

The liar paradox (in the form "What I now say is a lie") exposes the incommunicability of sincerity in a striking way (Luhmann, 1995a, p. 151): whether or not the person is lying cannot be decided on the basis of that person's testifying to her own intent. The paradox discloses that the risk of insincerity cannot be eliminated. Alter's communications about the contents of her consciousness of the type "I swear I will tell the truth, the whole truth and nothing but the truth, so help me God" do not solve the problem of the inaccessibility of her consciousness to the ego, but only thematizes it as a limit of communication, as what cannot be known and made transparent. It is impossible to exactly translate conscious experience into a communication (Moeller, 2006, p. 80).

Luhmann calls the situation of mutual opacity of consciousnesses (or social systems) "double contingency."[26] Luhmann defines contingency in reference to Aristotelian modal theory as something that is neither necessary nor impossible (Luhmann, 1995a, p. 107) (later we will see how Agamben reworks this notion). All selections, all interpretations, understandings and explanations — all mappings of a set of facts to a meaning rather than another — are contingent, which means that alternative mappings were possible, and the current selection might not have been made (Luhmann, 1976, p. 509). Contingency is thus "something given (something experienced, expected, remembered, fantasized) in the light of its possibly being otherwise; it describes objects within the horizon of possible variations" (Luhmann, 1995a, p. 106). Because of this, the risk of insincerity cannot be eliminated, although a communicative system can mitigate it.

In Luhmann's work, "ego" can be understood as an individual consciousness but also as a social system (Luhmann, 2002b, p. 318). The possibility of ego to communicate something meaningful or informative that alter understands depends, first, on the possibilities available to ego. What I can try to communicate to others about, say, a factual situation around me is, first, a) a contingent selection among possibilities and b) dependent on "what [my] own memory supplies" (Luhmann, 1981, p. 123). Second, ego's communicative intent is irreducibly susceptible to interpretation by alter that is also conditioned by this same contingency. Thus, "[w]here two social systems [or psychic systems] encounter one another, each selection of system A depends not only upon its own selectivity (that is, its selection of meaning from those available to it), but also upon the selectivity of the other system, B" (King & Schütz, 1994, p. 272). Ego makes her selection dependent both on expectations of alter's

[26] Here he follows the sociologist Talcot Parsons (Parsons & Shils, 1951).

selection and expectations of alter's expectations of ego's selection. "Each system therefore constructs its relationship to the other from meaning that is available exclusively to itself" (King & Schütz, 1994, p. 272), even when it concerns alter. (See here once more the "re-entry" that we mentioned above in a different context.) This internal constitution of meaning concerns also what ego thinks that alter thinks of ego's thinking of alter. On the other side as well the same thing happens, as ego and alter are both egos, which means that there is, in fact, a "double 'double contingency'" (Vanderstraeten, 2002, p. 81).

Ego and alter approach "the same" situation from their own, irreducible perspectives that remain reciprocally opaque. Ego cannot know for sure what alter will do, and alter cannot know for sure what ego will do. No theory of meaning and communication can rely on the idea of ego and alter both somehow magically making in their minds the "same" selection within "the same" horizon of possible variations. Because of the "eigen-selectivity" of each system (Luhmann, 1995a, p. 107) (each experiencing unsharable experiences of the world on grounds of their own past experience), *alter necessarily escapes* the calculation by ego. "Because operative closure locks the door to the inner life, imagination, and thoughts of others, the other holds us captive as an eternal riddle" (Luhmann, 2000, p. 13). Such incalculability is for Luhmann a mark of alter's "freedom" (Luhmann, 1995a, p. 112). Communication arises not despite but *on grounds of this freedom*, as a reduction to a manageable level of the contingency and complexity of possibilities it entails. Each person is too complex to be contained in knowledge about that person; there can only be reductive anticipations of how a person will behave. The notion of anticipation, or expectation, implies the possibility of its non-satisfaction. Free persons may always surprise. But it also implies normalization: some kind of behavior becomes expected as normal behavior, whereas other kinds become less so.

This insight about the inaccessibility of the alter's perspective for the ego has multiple implications in Luhmann's theory of communication.[27] First, the concept of meaning has to be rethought. Meaning is nothing positive, like a stable relation between the word "lion" and all existing real lions, but a difference: a difference between actuality and potentiality. Meaning is self-referential: meaning refers to other meanings that are not actualized at this very moment but could be. When observed sociologically, Luhmann argues, it can be seen that social systems operate in a way that introduces certain relatively stable "cuts" within the form of meaning (i.e. a distinction into actualized meaning and the horizon of possible meaning). For example, the systems of science and education exclude "quaddition" from the possible meaning of calculations. The system's programs that allocate the truth value (science) and the value of learning (education) prevent in a relatively stable manner that possibility from actualizing itself successfully. "Quaddition" would simply count as an error and non-learning within these systems of meaning.

[27] The implications become visible as implications in the case that this inaccessibility is taken as an entry point into a theory that defines its key concepts circularly (see Baraldi et al., 1999, pp. 7-11); after all, systems theory discovers itself as one of its objects, i.e. as a self-referential system (Luhmann, 1995a, pp. 13-16). The suggested entry point therefore breaks theory's circularity for the benefit of a selected order of exposition, indicating that other expository paths could have been taken.

Second, the relation of consciousness to communication is indirect, mediated by language, gestures, eventually by communication systems and "symbolically generalized media" (see Luhmann, 2012, chapter 2, sections 9-11) such as law, politics, science and religion. Also, the body as a living organism is observed only indirectly in communication systems, in the observing system's own terms, and its operative processes as such are excluded. Both consciousness and the body can, however, "irritate" communicative systems, because they share a "material continuum" (Luhmann, 2012, p. 54), that is, they are causally (although not operatively) related. Significantly, Luhmann generalizes operative closure across different types of systems and argues that also social systems are operatively closed. This has implications for how the theory conceives of the relation between law and non-law.

Third, because consciousnesses are black boxes to each other and operate on grounds of "eigen-selectivity," communication between them has to be conceived differently than in terms of the sender transmitting to the receiver informational content that is the same on both sides. A theory of communication has to take seriously the plurality of incongruent perspectives and the operational closure of consciousness. This leads to *non-reductivism*: the refusal to reduce communication, and communication systems, to individuals exchanging information. The Kripkenstein, reformulated in Luhmannian terms, states that meaningful communication is impossible as consciousnesses are operatively closed to each other, but this very same double closure also makes meaningful communication possible. In fact, only now does it receive a strong formulation: the conditions of impossibility of communication are its conditions of possibility.

It must be understood, however, that in Luhmann's evolutionary theory, double contingency is somewhat equivalent to a "hypothetical state of nature" (Stäheli, 2000, p. 47) in classical political theory. It is not an actual historical origin that has causally given rise to communication systems. The paradox of sincerity and the closure of consciousnesses to each other are rather "origin myths" internal to communicative systems: they are "the other" that the successful evolution of communication has succeeded in repressing. This means that a system of communication never directly observes its own beginning. It has always already solved the problem of double contingency insofar as it actually operates and holds the normal continuation of communication probable. In normally functioning everyday communication, the problem that ego and alter do not have direct access to each other's mind can be forgotten, at least as long as no interruptions and conflicts arise. If and when interruptions arise, when ego and alter no longer understand each other, the paradox of sincerity and double contingency become visible for the participants as something that normal communication now unsuccessfully solves, thereby demanding further inventions and explanations to get communication going again. "As long as ego cannot act without knowing how alter will act and vice versa, the system is underdetermined and thereby blocked" (Luhmann, 1995a, p. 131). Insofar as no determining and thereby information-producing selection succeeds in excluding alternatives, social actors are overwhelmed by an abundance of possibilities and no orientation as to how to continue action in relation to the others can arise.

3.3.2 The autopoiesis of communication

Paradox is, for Luhmann, embedded in the theory of systems' autopoiesis. "The concept," he explains, "belongs to the wider context of chaos theory or the theory of catastrophe" (Luhmann, 2004, p. 466). Paradox is the trace of "original" chaos within an autopoietic system, the chaos and unmanageable complexity that the system has managed to suppress in its normal operation. For Luhmann, communication systems are *autopoietic*, which means that they "are the products of their own operations" (Luhmann, 1993a, p. 771).[28] Living cells produce living cells, communication produces communication, and this production is what they do. There is no communication, unless communication itself establishes something as communication. Autopoietic systems are, literally, self-reproducing, and their emergence cannot be understood causally, as a result of a maker exterior to them. No communication can emerge from non-communication, but only from another communication. It is not possible to locate the emergence of a communicative system to a given moment. Their emergence is, paradoxically, always already about their reproduction.

This is the operational closure of systems: operations of a system are produced recursively, by its own operations. For Luhmann, "[a] system then is an 'andness.' Unity is provided by the 'and' but not by any one element, structure or relation" (Luhmann, 2006, p. 46). Systems "exist as a closed network of the production of elements [i.e. operations] which reproduces itself as a network by continuing to produce the elements that are needed to continue to produce the elements" (Luhmann, 1990a, p. 145). By reproducing itself, the system reproduces in each operation its difference from what it is not. Without such recursive reproduction through actual operations, there is no system, and no environment. The operative closure of reproducing the system's elements (like thoughts or communications) simultaneously reproduces the distinction between thought/non-thought and communication/non-communication, that is, the distinction between the system and the non-system, i.e. the environment (Luhmann, 2002b, pp. 79-80). "The system creates itself as a chain of operations," Luhmann writes. "The difference between system and environment arises merely because an operation produces a subsequent operation of the same type" (Luhmann, 2006, p. 46). And elsewhere: "Operationally speaking, an observer emerges as a system through a consecutive sequence of his observational operations" (Luhmann, 1999, p. 19).

We saw with Kelsen that law can only understand acts as legal acts, and no "constituent power" can create a legal order without appearing already as a

[28] Luhmann borrows the term autopoiesis from the work of the Chilean biologists Humberto Maturana and Francisco Varela, who used it to describe the self-reproduction of biological systems, like the production of cells from other cells. Luhmann explains that Maturana originally invented the term as a sort of combination of Aristotle's notions of *praxis* and *poiesis*. *Praxis* denotes action that does not have an external purpose, but its purpose is itself as an action. Virtuous public action in the *polis*, playing flute, philosophical reflection — all these actions can be conceived as actions for their own sake, without an external object. *Poiesis*, by contrast, is about producing something external to the act of production itself. Autopoiesis then bridges these concepts: it is action that produces itself, or in systems-theoretical terms, an operation that has as its product another operation of the same type (Luhmann, 2002b, pp. 110-111).

"constituted power." For Luhmann, the social subsystem of law cannot be understood in terms of "acts" at all. Society and its subsystems do not originate in acts of human beings. They are not products of human will. Instead, they are communicative systems, and they only "consist" of communications that link up with other communications. Whereas Kelsen still entertained the possibility of an image of a static origin (i.e. the basic norm) of an otherwise dynamic legal order, for Luhmann, no such highest norm to which other norms could refer exists. The only possibility is to see the basic norm as a theory figure (like Hart's "rule of recognition") that attempts to deparadoxify the code's self-referential paradox (Luhmann, 2004, p. 125). Law operates always on grounds of past law, *as if* law had always already existed, already before acts of constituent power and as its ground of validity. "In the beginning there is a distinction, and even if it were only the construction before/after, it always (like every distinction) first emerges retroactively" (Amstutz, 2008, p. 126, my translation).[29]

Autopoiesis has, according to Luhmann, three dimensions: *factual, temporal and social*.[30] Factually, autopoiesis of communication is about drawing a distinction between the communication (self-reference) and the communicated (hetero-reference) in the communicative event. Temporally, it is about operativity, recursively referring this event back to previous communications and anticipating further communications. Socially, it is about the exposure of the communicated meaning to understanding (and further to acceptance or rejection) (Luhmann, 2000, p. 11). All these dimensions circularly refer to each other and cannot be thought in isolation.

The factual dimension of autopoiesis means that for a communication to arise *something* needs to be communicated. Something must become *uttered* in some way (spoken, written, gestured) and this utterance received as an *informative* communication. An utterance needs to succeed in making a distinction between itself as an utterance and what it wants to communicate as information, that is, to distinguish self- and other-reference. An utterance refers to something beyond itself, to a communicative theme. Something about the infinite complexity of the world is selected as relevant and interesting enough to merit being communicated as information. Thus, information "'is definable as a difference that makes a difference'" (Luhmann, 1995a, p. 40, referring to Gregory Bateson). It "is not something that the system takes in from the environment. Information does not exist 'out there,' waiting

[29] "Am Anfang steht Unterscheidung, und sei es auch nur die Konstruktion des Vorher/Nachher, die ja immer (wie jede Unterscheidung) erst im nachhinein entsteht."

[30] For Luhmann, the spatial dimension — the boundary between the inside (system) and the outside (environment) — is arguably only metaphorical. It is not a *stricto sensu* spatial boundary, but rather a temporal one. It is to be understood as the maintenance of the capacity of system's operations to continue to link up with the system's subsequent operations (see Fuchs, 2013, pp. 99-100). "The closure takes place in time through the connections or supplements that recognize prior events as apposite, as compatible with the system" (Fuchs, 2013, p. 100, my translation). ("Die Schließung erfolgt in der Zeit durch die Anschlüsse bzw. Nachträge, die Vorereignisse als passend, als systemkompatibel diskriminieren.") Social systems are, as non-spatial, nowhere to be encountered; they do not have "a postal address." This is why, Fuchs suggests, social critique is such a difficult topic for systems theory: "the society," "law," "economy" or "politics" cannot hear any critique, conventionally understood (Fuchs, 2013, pp. 101-106). Thereby it is understandable that attempts to think about "critical autopoiesis" have also been attempts to rethink the status of space, bodies and materiality in systems theory (see Philippopoulos-Mihalopoulos, 2011). I come back to the question of law's spatiality in my discussion of Lindahl's theory.

to be picked up by the system" (Luhmann, 1990a, pp. 3-4). Information is rather a result of selection and, thus, system-specific.

Furthermore, perhaps counterintuitively but importantly, the sender of the communication is not the origin of the distinction between utterance and information. This follows from the emphasis on autopoiesis that excludes the external maker. Luhmann emphasizes that communication is not about the transmission of information contents:

> The metaphor of transmission locates what is essential about communication in the act of transmission, in the utterance. It directs attention and demands for skillfulness onto the one who makes the utterance. But the utterance is nothing more than a selection proposal, a suggestion. Communication emerges only to the extent that this suggestion is picked up, that its stimulation is processed. (Luhmann, 1995a, pp. 139-140)

Luhmann rejects the conception of communication as ego transmitting a fully formed informational content to the alter who receives it as such, the content being the same on both sides. The receiver of information is not passive but instead has *communication-constitutive significance*. There is a primacy of the receiver that Luhmann emphasizes by naming the sender "alter" and the receiver "ego" (Rasch, 2000, p. 54, Luhmann, 1995a, pp. 141-142). A communicative event emerges as such only if *the receiver* makes a distinction between utterance and information by *understanding* what the utterance conveys as information. This is the *social dimension* of communication: the sender exposes her communication to the selectivity of other systems (psychic and social) that are constitutive of the utterance in order for it to count as information. A communicative proposal is at best an irritation that the receiver understands, or not, and then accepts or rejects.

It is important to note that, for Luhmann, "understanding" does not mean overcoming the mutual opacity of ego and alter. "Understanding" is, rather, a communicative event in its turn. "By 'success' [of a communication]," Luhmann writes, "I mean that the recipient of the communication accepts the selective content of the communication (the information) *as a premise of his own behaviour, thus joining further selections to the primary selection and reinforcing its selectivity in the process*" (Luhmann, 1981, p. 124, my emphasis). How ego experiences alter's selection in the privacy of her mind is irrelevant for the purposes of communication. What matters is that ego's behavior meets alter's expectations of that behavior. Confirmation of expectations re-entrenches the initial selectivity, thereby making communication on its basis more probable than communication on an alternative selection.

What, then, presents "the solution" to the problem of double contingency is *time* and the iteration of certain selections and confirmation of certain expectations over time. A social system has emerged *when behavior can be seen as being able to connect with behavior* (*Anschlussfähigkeit*): ego responds to the alter as accepting her selection as informative and takes it as a premise of her subsequent behavior. An

utterance is taken to be a communication to which further communication will be connected. Communication systems are irreducible to psychic systems and challenge all theories that explain social order by tracing them to the individual's will, action or needs. Both psychic and social systems operate within or *as* their respective recursive circles, and can irritate, but not directly steer each other.

Operative closure suggests that systems operate according to their own time. This is the third, temporal dimension: each communication refers to past and future communications of the system to which it is identified to belong, just like each thought refers to past and future thoughts of the same consciousness, but these two operative temporalities (consciousness and communication) do not fuse. If each communication already presupposes communication in order to count as such, no pure origin as a present moment in time can be singled out as the first step, and the system itself cannot observe its own beginning. An account of system genesis is an external account by the sociologist, although systems, like the legal system, can of course come up with narratives of their own history, and these histories unfold the paradoxical origin by presenting the emergence of the system in a sequential (rather than retroactive and recursive) manner. But to come up with one's history requires that the system is already (presupposed to be) in place. Luhmann insists that communication is not like *creatio ex nihilo*, but a single communication only makes sense against a background of communication, in a network of communication and accumulated meaning. Communication that only happens once and as a pure singularity does not and cannot make sense. New communication is possible only as an iteration of other communications that both differs from the past and repeats known grounds (Luhmann, 2002b, pp. 111-113).

3.3.3 Binding time

Social systems are, thus, forms of social order that limit what kind of behavior has connective and communicative value. Only by behaving in certain ways rather than others, only by taking a system-specific selection of behavioral possibilities as the premise of one's own behavior, does one count as a social actor, as someone communicating intelligibly (and avoiding sanctions for deviant behavior). "[E]ach communication," Luhmann writes, "is binding time in so far as it determines the state of the system that the next communication has to assume" (Luhmann, 2004, p. 144). In other words, a system operates by structuring the future, by anticipating, on grounds of their memory of their own operations, what will, and/or what ought, to happen in the future. In cases of disappointment of its expectations, the system will either modify its expectations on grounds of new information or uphold them despite their dissatisfaction. This is Luhmann's famous distinction between "cognitive" and "normative" expectations. To sum up in Luhmann's own words: "The openness of the initial situation [of double contingency] is transformed into a projection of [systemic] structure" and this means "delimiting ranges of possibility" (Luhmann, 1995a, p. 133)

for social actors. "They [societal subsystems] employ their selection pattern as a motive to accept the reduction, so that people join with others in a narrow world of common understandings, complementary expectations and determinable issues" (Luhmann, 1976, p. 512). It is against the background of such a narrow world that the paradox looks like an explosion.

Double contingency, just like a paradoxical situation understood as an explosion, is uninformatively complex: there are too many, an unrestricted number of possibilities, which paralyzes observation of meaningful things and coordination of expectations. Such complexity must be reduced to an order within which only a *finite number* of possibilities can be expected in order for communication to happen, conflicts to be resolved and being legally right or wrong to be distributed. "The repeated use of communicated meaning fulfills a double requirement: the results are, finally, a meaning that is fixed by language and a differentiated societal communication" (Luhmann, 2004, p. 144). In Luhmann's account of the genesis of meaning, meaning is "condensed" over time and through repeated use. Meaning has emerged if in new situations something can be recognized as the same as before. Social order arises through iterating some selections of communication rather than others across different situations (Luhmann, 2004, p. 144). Its "foundation" is nowhere else except "in" its own iteration. It only exists as its own autopoiesis. The structures (i.e. expectations) that guide operations have their source in nothing else except their "condensation and confirmation" by those very operations (Luhmann, 2004, p. 85). Social structures emerge, when expectations about the next suitable communication emerge: for Luhmann, "social structures are expectational structures" (Luhmann, 1995a, p. 292).

Systems are not only "first order observers," but also "second order observers," that is, observers of their own observations. This means that they do not only communicate about something, but also about what they take to be their own communications. In other words, they regulate their own communicative operations. As Dirk Baecker puts it:

> [s]ocial systems must themselves decide whether, how, and by whom they demand the mere calling again [i.e. iteration; HL] of their distinctions; whether, how, and by whom they tolerate the crossing of their distinctions [i.e. non-acceptance or deviant behavior; HL]; and whether, how, and by whom they support the observation of the form of their distinctions [i.e. critique; HL]. (Baecker, 1999, p. 5)

What systems deem as not confirming their expectations is dealt with by the means that systems themselves have invented for this purpose. Therefore, the communications of Kripke's skeptic in the context of Kripke's story (classroom) will simply count as an error and as unable to connect to subsequent communications. Deviance is socially costly, and results in exclusion from the communication in question, unless the system itself decides to identify deviance as a learning opportunity and an occasion for adapting expectations. The stability of meaning (of mathematical

functions) is ultimately guaranteed by the operativity of the system in question (of science, of education). Although an external observer (the critic, Kripke) can formulate the paradox and even see that it points to the problem of the origin of meaning and social order, operating systems have always already deparadoxified the paradox by determining with sufficient precision what can count as a meaningful communication within them.

Contingent communication systems thus reduce complexity in temporal, social and factual dimensions and make meaningful and informative communication possible. They limit, from their own perspective, what counts as relevant topics of communication, how communications connect with past and future communications, and who is expected to conform to expectations created by the system and what happens in cases of deviance. Communication happens against the background of double contingency, and as the reduction to finite and manageable proportions of the complexity it implies. Such reductions happen at many different levels, all the way from patterns in simple interaction systems, like familiar everyday behavior among friends and family, to social orders at the level of functionally differentiated social sub-systems of law, science, education and economy.

3.3.4 The retroactive construction of communication

To finish this section, let me highlight the significance of the indirect constitution of something as an informative communication. Luhmann emphasizes the importance of the perspective of the *receiver* for something to count as a communication. In the following sections, I will then seek to show how this indirectness characterizes the operation of the legal system as an immune system for society and draw some implications from it to Luhmann's understanding of conflict, critique and justice.

Jean Clam notes that "[t]he structural consequence of such a setting [of the constitutive significance of the receiver for communication is] a *backward construction of communication* from its understanding (*Verstehen*) to its conveyance (*Mitteilung*) [i.e. utterance; HL] and from the latter to its information or content (*Information*)" (Clam, 2013, p. 24). Alter's communicative intent registers as such only *after the fact*, if the ego receives it by understanding it. Clam describes beautifully this complicated temporality of the constitution of communication:

> [W]e don't know what comes up from our communication intention; our intention, what we want to say, to do, to initiate, to provoke, to hinder, to leave undone and so on, is not first in ourselves and has to be expressed, exteriorized by means of operations of communication. It is what it is from its backward response or non-response, from its striking on the demand of the other — which in its turn is nothing by itself but comes to pass by striking the demand it encounters. Information (flowing in channels of communication), intentions of

> communication (skewing the contents it conveys), understandings of such *intentions and informations are never given as such*, are in a way never there. *They come to their own significance post factum*, they find their meaning *nachträglich*, in the aftermath of communication. (Clam, 2013, p. 25, original emphasis.)

It should perhaps be noted that the concept of *Nachträglichkeit* that has been translated as variedly as "afterwardness," "retroactivity," "après-coup," "deferral of meaning" (see Eickhoff, 2006), was originally used by Sigmund Freud to describe a traumatic or sexual meaning attributed only retroactively to the memory of earlier events. It indicated a complex temporality of the formation of personal identity, in which later meaning-constitution of memories shows the given experience in a new light but, paradoxically, allows the person in question to "finally" understand who she "really" was all along. Traumatic memories that before were pushed to the unconscious now receive meaning, which constitutes for the person how her past "truly" was. "As the traumatic event was not understood while it was happening, it becomes recognizable at a place and at a time that do not correspond to the original situation" (Eickhoff, 2006, p. 1464). This *deferral of meaning*, the becoming-available of meaning of the past only in the present, implies "the darkness of the blink of an eye," inaccessibility of the lived moment (*das Dunkel des gelebten Augenblicks*);[31] only later does the memory of the undecipherable lived moment become deciphered in a way that elucidates the darkness of the past and constitutes it as a part of who the person is. What before was neutral or unconscious for the person, becomes articulated as possessing identity-constituting significance. The temporality of the *Nachträglichkeit* signifies an inversion of causal temporality — first a cause, then an effect — as it suggests that only what comes later, as a supposed effect and supplement, makes it possible to see something as a cause or an origin. What comes later constitutes its own origin and claims that this is how things were all along. "[S]upplementarity produces *après coup* that to which the supplement should simply have been added on," as Fabio Ciaramelli puts Derrida's take on the (non-)concept of retroactive temporality (Ciaramelli, 1998, p. 259, my translation).[32] And more: only as supplemented by what comes later can the origin be accessed. The past becomes interpretable as a significant, non-neutral past of the present only from the perspective of the present, that is, when there is no longer direct access to the origin.

Communication is, in all its closed and self-referential autopoiesis, *responsive*: a system responds to irritations from its environment that it understands and interprets according to its own system-specific means. The event of utterance is constituted as communication *nachträglich*, in and through its understanding reception by a system. This suggests that communicative systems emerge as a response to affection, or "irritation" in Luhmannian terms, although only the specific sensitivity of the system is responsible for the meaning of that affection/irritation. *Something*

[31] Ernst Bloch in *The Principle of Hope*, quoted in Eickhoff, 2006, p. 1453.

[32] "[L]a supplémentarité produit après coup ce à quoi le supplément aurait dû simplement s'ajouter."

irritates the system and becomes observed as meaningful and informative in some way rather than another, regulated by the system-internal law of communication. Because "[i]nformation is an internal change of state, a self-produced aspect of communicative events" (Luhmann, 1990a, p. 10), it requires an internal articulation of time as the system's own past enabling certain kinds of linking of future communication. System-internal time allows for understanding new events as a difference between system's past and future. *Nachträglichkeit* indicates, however, that there is a "gap in time," an interval, between the system and what irritates it, that whatever happens simultaneously in the environment is inaccessible for the system in any other terms except in its own:

> What comes to be as an identity, will each time be established retroactively, through connections that take up what happened as something determinate, as belonging; through connections that themselves are assigned to connections. The operative event is then not a singular cognition or communication, but their observation after the fact, in the mode of a "thereafter" that creates its "before" — for the time being. (Fuchs, 2013, p. 100, my translation.)[33]

Luhmann distinguishes between causality and operativity, insisting that system boundaries block direct influence on its operations. What is in the environment of a system does not directly regulate and direct the system's operative states, although it may irritate the system causally, push it to alter its current state. Such alteration is, however, always a system-internal operation. The system itself in its own recursive loop interprets the meaning of its irritations, and the relation to the environment is indirect. Operative closure does not mean that causality would not play any role at all — for Luhmann, social systems are causally dependent on conscious and living systems, as well as on certain "physical conditions for life on earth" (Luhmann, 2004, p. 80). But as producers of meaning and social order, social systems are closed upon their own operations. Their operations constitute something *as* relevant, *as* informative for the system, and in this way the something is present in the system — otherwise it remains absent for it. Luhmann describes this absence with Derrida's help as follows:

> What is excluded [from the system], what does not take part operatively, will still be handled as present. The system's boundary to the psychical and the biological [like to other social systems and everything else in its environment] is built into its functioning as a presupposition or a requirement. These are theoretical figures that emerge from time to time in philosophy. In Jacques Derrida, for example, there is the idea that there is a non-present factor that leaves traces, *traces* in French, *íchnos* in Greek, and then the traces will be

[33] "Was jeweils als Identität zustande kommt, wird in der Form der Nachträglichkeit ermittelt, durch Anschlüsse, die das, was geschah, als Bestimmtes, als Zugehöriges aufgreifen: durch Anschlüsse, die selbst auf Anschlüsse angewiesen sind. Das operative Ereignis ist dann nicht die singuläre Kognition oder Kommunikation, sondern deren Hinbeobachtung im Modus eines Danach, das sein Vorher erzeugt – vorübergehend."

> erased and nothing visible remains of them. Whether there is enough blood flowing in the brains is not talked about constantly in communication. [But] this possibility to talk about it requires that it is already there. "The absent," in Derrida's jargon, is present, even if it is not exactly present: a clear paradox in the formulation. (Luhmann, 2002b, p. 266, my translation.)[34]

The "something" "already there" that irritates the system and that the system comes to observe in its internally regulated process of communication is rendered present for the system only insofar as this is allowed by the system's possibilities for connectivity. This is one more paradoxical articulation of the externality that is constructed as such inside, within the system.

3.4 Law as society's immune system

Let us now draw some implications of this general theory of communication for the legal system, paying in particular attention to Luhmann's claim that the legal system functions as the society's "immune system" (e.g. Luhmann, 2004, p. 384).

3.4.1 Protecting normative expectations

What, then, can be expected of the other and of her expectations? Luhmann holds that in modern society, the normativity of "normality" (i.e. how a "normal person" behaves in a given situation) is no longer sufficient to reduce the uncertainties implied by double contingency; normality and normativity are distinguished. The legal system is the locus for spelling out and entrenching artificial normativity that is not mere "familiarity" (Luhmann, 2004, p. 153). At the most general societal level it is the legal system that answers the question of what can be expected of the other. Although custom and morality still produce normative expectations, only law provides a *second-order normativity* that offers structures for the creation, change and enforcement of legal (first-order) normativity. In other words, the legal system stabilizes society's normative expectations of normative expectations over time. What the legal system does is "transfor[m] the distinction between cognitive and normative expectations into an object of expectation in its own right" (Luhmann, 2004, p. 157). That is to say, the

[34] "Was ausgeschlossen wird, was operativ nicht teilnimmt, wird trotzdem wie anwesend behandelt. Die Grenze des Systems zum Psychischen und Biologischen hin ist als Präsupposition oder als Voraussetzung des Funktionierens mit eingebaut. Das sind Theoriefiguren, die in der Philosophie gelegentlich auftauchen. Bei Jacques Derrida zum Beispiel gibt es eine Idee, dass es einen nicht anwesenden Faktor gibt, der Spuren hinterlässt, traces im Französischen, íchnos im Griechischen; dann werden diese Spuren gelöscht, nichts davon wird sichtbar gemacht. In der Kommunikation wird nicht ständig darüber geredet, ob die Durchblutung des Kopfes ausreicht. Spuren werden gelöscht. [Aber] diese Möglichkeit, darüber zu reden, setz voraus, dass es immer schon da ist. Das 'Abwesende' — im Jargon von Derrida — ist präsent, obwohl es eigentlich nicht präsent ist, eine klare Paradoxie in der Formulierung."

legal system protects society's expectations that there will be legally determined normative expectations of how one ought to behave that will resist disappointment and be upheld in cases of disappointment, and that those who deviate, will face legally determined consequences.

For Luhmann, law's function in society is temporal: it tries "to anticipate, at least on the level of expectations, a still unknown, genuinely uncertain future" (Luhmann, 2004, p. 147). Luhmann understands legal norms from this functional perspective as attempts to bind the future by stipulating what ought to happen. Law makes it known in society "which expectations will meet with social approval and which not" (Luhmann, 2004, p. 148), thereby pushing behavior in a legally normalized direction. However, "[n]orms do not promise conduct that conforms to norms," and indeed commonly enough, factual conduct does not correspond to norms and law is breached (Luhmann, 2004, p. 150). Therefore, law can only promise that it will "protect all those who are expecting such a conduct" (Luhmann, 2004, p. 150). Law protects, in other words, normative expectations of norm-conforming conduct: it is legitimate to expect that other people's behavior satisfies legal expectations. In probable cases of dissatisfaction, law protects the expectation that law deals with this dissatisfaction and "a violation of rights is not just tacitly accepted" (Luhmann, 2004, p. 159).

Luhmann defines norms as having an "if, then" structure. Law creates "conditional programs" that determine the conditions for the correct application of the code legal/illegal. A legal norm uses the code, but it is the program that gives the content to the norm, that establishes what kind of conduct will be considered legal or illegal (Luhmann, 2004, pp. 196-197). Norms as stabilized normative expectations regulate conduct across temporal, material (factual) and social dimensions: they spell out what is regulated (law's matter), i.e. what kind of conduct the law considers as legal or illegal; they will be upheld against their factual disappointment and be altered only according to the temporal rhythm determined by the legal autopoiesis (legally regulated processes of legislation and adjudication); and they determine who is expected to conform to legal expectations, to accept and not reject them, by taking them as a premise of their own conduct.

Legal autopoiesis creates and protects normative expectations, which do not necessarily correspond with individuals' expectations: "The norm is maintained by previous and subsequent practice, by sequences of operations that always make the norm turn out the same way (whatever the discretionary ambit that interpretations may provide)" (Luhmann, 2004, p. 109). Norms can of course also be changed and expectations adjusted, but change must always take place under autopoietic conditions of incorporating the change into the ongoing practice of the system's decision-making (Luhmann, 2004, p. 109). This also applies to legislation as a process in the political system. Political decisions claim to be "collectively binding" and as legislation, they must take a legal form (Luhmann, 2004, p. 392).

Luhmann's account of the legal system is based on the analysis of the genesis of system autopoiesis and operational closure. "There is, in other words, no external determination of structures. Only the law itself can say what law is" (Luhmann, 2004,

p. 85). The legal system is the only "authority in society which can proclaim: this is legal and this is illegal" (Luhmann, 2004, p. 100, emphasis omitted). Legal communications use the binary code legal/illegal, and this code is what allows the legal system to distinguish between legal and non-legal communications, and thereby establish a distinction between itself and its environment (this includes all other communications except those that the legal system itself identifies as legal). Luhmann's distinction *recht/unrecht*, or *Recht/Unrecht*, thus translates both as "legal/illegal" (or "lawful/unlawful"), which means that things can be either legal or illegal for law, and as "law/non-law," which means that by deciding what counts as legal and what illegal, the legal system differentiates itself from the domain that remains irrelevant to it, i.e. from its environment (King & Thornhill, 2003, pp. 55-56). It is through the allocation of this code to those events in its environment that it deems relevant, that the legal system observes its environment and reproduces itself in the process. As Luhmann puts it, "[a] communication is not unlawful, rather it is an impossible one [within the legal system], if it does not fit into the coding legal/illegal" (Luhmann, 2004, p. 120). The code legal/illegal does not accept third values, and this is why it is both paradoxical when applied to itself, and in need of "unfolding," which seeks to make the binary code socially adequate regardless of the inconsistency and lack of grounding that haunt it.

Normative expectations are society's *immune system*, which "prevent[s] disappointment from resulting in the annulment of structures" (Luhmann, 2004, p. 384, see also Luhmann, 1995a, p. 375). If I suspect that somebody has stolen my property, I can take my case to the police, and ultimately to the court, to investigate of whether a theft took place and who the guilty person was and receive compensation from that person. I do not have to give up on my normative expectation that I alone have the right to decide what to do with my property, but in case of a disappointment of this expectation, the legal system assists me in entrenching this expectational structure by punishing those whose behavior disappoints it and recognizing my right to compensation for losses. In investigating this conflict and deciding whether and how a dissatisfaction of normative expectations has taken place (i.e. by applying its code with the help of programs), the legal system differentiates itself from its environment. For example, it may not see as relevant to the legal assessment of the case the economic status of the parties, for instance that the person who took my property was "poor" according to some economic criteria. It is, however, not excluded in any absolute sense that non-legal facts, such as the economic status of the defendant, are recognized as relevant for the legal decision. Being hungry may function as a mitigating factor and save the defendant from being convicted of a petty theft, should the legal system consider such a fact relevant to its decision.

It is commonsensical to understand "expectation" as something that one has *now* in the present moment, something the content of which one knows, and something that will either be confirmed or disappointed *in the future*. Its temporality is sequential: first expectation, then its confirmation or disappointment. First, there is a determination of the expectation (norm) by a legal decision, and, then, after the decision, the expectation binds future conduct, at least until law itself reconsiders its

bindingness. This is also the legal system's self-understanding of its own temporality. Furthermore, legal expectations have to be made public, so that law's addressees will know what is expected of them now and in the future. Retroactive law is explicitly forbidden. As King and Thornhill write, normative expectations "must restrict freedom of conduct *in advance*, so that it can be known by 'anyone who wants to act in that way that they will be violating expectations and so be disadvantaged right from the start'" (King & Thornhill, 2003, p. 53, referring to Luhmann, 1993b, p. 129, my emphasis). In the court of justice, then, the already known normative expectation of how one ought to behave can simply be picked up and used as a rule for solving the case.

However, within such a complex system, it must frequently be unclear for both addressees of the law and the law itself how legal expectations regulate a given situation. What kind of behavior will count as legal and what illegal here and now? This is arguably not always, nor perhaps even in the majority of cases, evident even for legal authorities *before a legal decision is taken*. After all, many legal conflicts concern precisely different interpretations of what the valid normative expectation is. Expectations regulating a situation *now* will, instead, become formulated *only if determined by a legal decision* and, therefore, *only after* the decision. In fact, the very generality of law, and ultimately the protection of expectations of normative expectations itself, requires that expectations be left relatively indeterminate. Should the legal system attempt to regulate the future in its smallest detail, it would become internally too complex to operate (see Luhmann, 2004, p. 140).

Indifference to detail, or generality, protects the operability of the norm. Legal norms have to be formulated sufficiently generally, which implies that normative expectations must also remain relatively general — and sometimes this generality looks in the eyes of the addressees of the law like uncertainty of what exactly is expected of their behavior. Can they even always be certain that the legal system will clarify such uncertainty for them, according to its processes of decision-making, given that it is the legal system itself that will decide which cases merit consideration?[35] The legal code has universal applicability, but the system will decide when and to which issues to apply it. A legal decision, consequently, does not determine expectations only for the future, *but also for the past*, although it will not admit that this is what it is doing. The circular relation between structures (spelling out expectations) and operations (both being guided by *and* condensing structures) must imply that the decision will spell out, *for the first time*, what the legal system expected to be the case *all along*. The identity of the legal system — which normative expectations bear the stamp of legality and which not — becomes established in each decision and retroactively, although the court cannot explicitly say that this is what it is doing. Admitting it would count as exposing the temporal paradox and lead to inoperativity.

The legal system as society's immune system entrenches extant normative expectations, but it does not do this automatically. The distinction between cognitive and normative expectations is not absolute. The legal system may react to a critique

[35] For an illuminative discussion of the difficulties that migrants face when seeking to have their cases admitted to the European Court of Human Rights see Dembour, 2015, p. 2 ff.

that poverty may be a legally relevant fact in some situations: if law is too ignorant of the economic statuses of the litigants, it may be that it fails to adequately assist society in dealing with the risk of conflict related to economic inequality. If law comes to see poverty as constituting a significant risk of social conflict, it may take this into consideration in solving legal conflicts that have been brought to court. Singular decisions, like using economic status as a mitigating factor in a legal judgment, have surplus value in the sense that future legal resolutions of conflict will have to take them into consideration. In this way, by balancing the entrenchment of extant structures and their modification, the legal system develops itself as a dynamic immune system that is capable of conditioning social conflicts and preventing them from escalating. It seeks to achieve what Luhmann calls "adequate complexity": normative structures that are effective in dealing with future social risks (Luhmann, 2004, p. 219, 476). Entrenching extant normative expectations implies that the legal system must be indifferent to much of what happens in its environment. However, in order to maintain the immunity function of these structures, the system also needs to learn from the way its environment irritates it. The system must balance these two conflicting demands in order to maintain its own relevance as an autonomous social subsystem. Modification of some normative structures may seem necessary in order to maintain the general function of the legal system, the protecting of normative expectations.

3.4.2 The supplementarity of programs and the paradox of decision

Let us in the following subsections look more closely at this ambiguous immunologic. As should be clear by now, law as an immune system is not a metaphor for Luhmann (Luhmann, 2004, p. 475). We will see that it deconstructs, among other things, the facile opposition between law that is made (law from the perspective of the courts) and law-making (law from the perspective of the legislator), and characterizes the legal system as a paradoxical "controlled form of instability" (Åkerstrøm & Stenner, 2020, p. 81). I will show how this account of the legal system, which puts the emphasis on the paradoxical temporality of law's operation, questions the simple dichotomy between law as made and law-making, the perspectives of the judiciary and the legislative. We will see how, in its attempt to respect this institutional division of powers, the legal system displaces, but does not resolve, its paradox.

As mentioned, Luhmann notoriously insists on a distinction between the legal code (legal/illegal) and the legal programs that allocate the code and regulate how the code is to be used, when behavior is to be considered legal and when illegal. Figuring out how the code ought to be used, how to apply norms in a legal way in particular cases and to particular facts, is what the legal system does at the level of court proceedings. "Only the code — which allows for the attribution of the values legal and illegal, but leaves their application open — can produce the uncertainty on which the [legal] proceedings feed," Luhmann writes. "They, in turn, use this uncertainty as a medium for their own autopoiesis" (Luhmann, 2004, p. 206). Indeed, for Luhmann,

"[a]utopoiesis is [...] possible only if the system is in a constant state of uncertainty about itself in relation to the environment *and can produce and monitor this uncertainty through self-organization*" (Luhmann, 2018, p. 30, original emphasis). Repeatedly, in an always new present, the legal system has to reorganize itself by deciding what is now the legally valid way of allocating the legal code. Uncertainty about this functions as an irritant for the system (Luhmann, 2004, p. 208), requiring a response so that the system can re-identify itself and go on. "Every 'transcendental' identity could endanger the further reproduction of the system by itself" (Luhmann, 2018, p. 31), Luhmann warns. That a system is autopoietic and functions as an immune mechanism means that it does not have a fixed, substantive identity, but it is always burdened by the task of finding itself again in all its actual operations, to find again how communication connects with past and future communication. This requires, for the legal system in particular, *the making of decisions*.

For Luhmann, "a system exists only at the point in time at which it operates" (Luhmann, 2004, p. 283), which is the present. It is not determined by its past in any straightforward way, although it will always need to pretend that it is (as retroactive law counts as invalid and thus is no law). Instead, it needs to reactualize itself, its past included, again at each moment of operation. No structures are strong enough to force a legal decision, to select in advance the outcome of a legal decision in an actual case. The present is the time of decision-making, and "every present is burdened with the problems of redescribing its past and reprojecting its future" (Luhmann, 2018, p. 109). The distinction between the past and the future has to be continuously re-drawn. An autopoietic system is "a system that produces further operations from the state in which it has put itself" (Luhmann, 2018, p. 32), but it is in the present where the system needs to identify *what exactly that state is*. For a system:

> everything that is happening is happening in the present. [...] Also past and future are always, and only, relevant at the same time, and are discernible as such only in the present. *Their recursive linkages are established in their actual operations.* [...] An observer is [...] caught in the system that is tied to the conditions of time in its own right, that is, tied to the time which he respectively constructs as his horizon through its own distinctions in his own present time. (Luhmann, 2004, p. 82, my emphasis.)

This means that the past cannot be understood, in theory, as determining the decision (although in practice it will be so understood). If the decision was determined by the structures, this would mean that it was made already before the making of the decision, and hence the decision would be redundant and superfluous, no decision operatively arrived at. "The decision operates within its own construction, which is only possible in the present. [...] It opens up or closes down possibilities, *which would not exist without it*" (Luhmann, 2004, p. 283, my emphasis).

This cannot mean, however, that the decision arises *ex nihilo*. "At the moment of decisions, judges can make a variety of determinations, but they do so against a background of considerable redundancy" (Nobles & Schiff, 2009, p. 32). In systems

theory, redundancy is a central concept that explains why such problems of inoperativity and explosion (or in information theoretical terms, "chaos") as the one suggested by Wittgenstein's and the Kripkenstein paradox do not typically arise. It explains how the consistency of communication can be maintained by simply labeling the student's communication as an error, as being unintelligible given the background that sets the parameters for what can be meaningfully and correctly said at school (or science). Similarly, for law, the new case at hand must produce relevant information that is capable of connecting to the chain of past, similar and dissimilar, cases, and, for instance, to established legal principles, and thereby seek to avoid what can easily be labeled as "error," a wrong decision. Redundancy precisely reduces the freedom for legal communication, by establishing "the need for a judiciary to utilise a common basis for what is capable of identifying a legal communication" (Nobles & Schiff, 2009, p. 37).

Redundancy as a concept originates in information theory, and its importance for systems theory lies in that it denotes those necessary preconditions for something to count as an informative, and hence new, communication (Nobles & Schiff, 2009, pp. 27-28). Redundancy is the background of what is already known, formed by past communication and information, against which something can appear as new information (Luhmann, 1995a, p. 40). That the system is redundant means that it has already reduced the complexity of the situation in such a manner that the next operation does not have to begin everything all over again. It can instead rely on the fact that the system already is indifferent to much that happens in its environment, and on grounds of this indifference, sensitive to its environment in a particular way that helps the system not to be overwhelmed by environmental complexity and not to miss relevant new information. Only because redundancy makes possible a certain focusing and high degrees of indifference, can new information be acquired (Luhmann, 2004, pp. 316-317).

On the one hand, then, what is new can only be informative and "surprise" the system by comparison to what the system already knows. Information is what distinguishes a new communication from mere repetition of what is already known. The new needs the background of the old from which it is distinguished as the not-yet-known. On the other hand, new information must be connected to this background. Redundancy is the established "stock" of knowledge and meaning that puts limits to how information can be received and transferred, to what can be said and written within a social system, to what can count as an informative communication in a new situation. It also reduces system-internal complexity. Each new, intended selection of something as relevant unintentionally reproduces the system's redundancies (Luhmann, 2004, pp. 317-318).

Therefore, "[e]very decision that describes itself as a decision," Luhmann writes, and a court decision certainly describes itself as such, "runs into a paradox" (Luhmann, 2018, p. 104). On the one hand, there is no decision that does not repeat known grounds, but on the other, no past can determine a decision. No operation can take place without structure, but no structure simply causes an operation. Structure and operation are mutually dependent (recall, here, our discussion of the example in

the Introduction). Redundancy cannot exist somehow in itself, as a ready-made, already selected premise of the decision to be made, so the decision needs to decide its own past, its own grounds and claim that they exist prior to the decision and are what make it possible:

> Structures are only really real when they are used for linking communicative events; norms only when they are quoted explicitly or implicitly; expectations only when they are expressed through communication. [...] [T]he system is only actualized through its operations; [...] only what happens happens. (Luhmann, 2004, p. 82)

What is redundant cannot exist *without a present that selects it as such, as what precedes the present as its ground*. Only when it happens, when it is selected for use, is structure "really real." Redundancy is not a free-standing stock of available meanings — this would push Luhmann's theory from a resolutely operative, difference-based theory of the legal immunologic into the domain of theories of structure as some sort of stable substance. If the system only exists in its operative actuality, *this also applies to redundancy*, which means that the bindingness of the past in the present must be indicated in the present and by the decision itself. The present operation indicates the significance of the past for itself: it is the actual operation that retroactively, in the present moment, constitutes what it takes *as its own past, as a past relevant in the now and for the decision*. The meaning of the past is not simply recollected, repeated, but is rather constituted as a past in the present and for the present: "A social system must run a parallel procedure of recognition while performing its autopoiesis, which determines which earlier and later events have to be counted as communication (and especially as communication within its own system) and which not" (Luhmann, 2004, p. 88, emphasis omitted).

This suggests that the distinction between finding and making law is more complex than simple opposition. Judges who decide legal cases and put an end to legal proceedings that have been feeding themselves on the uncertainty of the proper application of the code will insist that they only discover and find the law rather than invent it (see Luhmann, 2004, p. 281). They present as consistent something that is inconsistent, as sequential something that is retroactive: they unfold the paradox. The principle of the division of powers may thus well be thought of as yet another deparadoxifying mechanism. The determinate content of the law is identified in the legal decision for the very first time in that particular articulation, but it is presented as already established law and thereby distinguished from unsettled law requiring law-making (see Nobles & Schiff, 2009). The past is given meaning in the present as a *present-determining* past — although this very operation, in the now, of determining the past as determining the present shows that the past is no such thing.

It is unlikely that any legal decision will explicitly describe itself as constituting its own past. What the law is cannot simply be assumed to be ready-made, because the "recursive support shifts from situation to situation" (Luhmann, 1990a, pp. 9-10), and yet there is the pressure of claiming that what is new was there already. The system of

courts consistently describes itself in distinction to the legislative and distinguishes between adjudication that is based on already existing law and political law-making that creates new law. This is a constant legal self-description in the modern legal system, as such part of the legal system's redundancy and definitely an important legal "ideology" in Luhmann's sense, that is, a self-description that seeks to make the legal system consistent and paradox-free in the society's and its own eyes. This "ideology" (and this term has no pejorative meaning for Luhmann) quite effectively prevents judges from describing their own actions as law-making (see Nobles & Schiff, 2009). They must make the paradox of the decision invisible, for if they admitted that they did create the law, this would lead to a crisis in the continuity of the legal communication. The coupling of the court's judgment with further legal communications would be endangered, because the decision would probably not count as a valid one and be therefore rejected as a legal communication. The court could be accused of entering the field of the legislator, of becoming political. The maintenance of the separation of powers is, however, important for the maintenance of the functional differentiation between the legal and the political system in modern society.

Theoretical, second-order observation can see, however, that the legal system has to "ascertain what it has done so far or what it will do in future in order to specify its own operations as legal ones" (Luhmann, 2004, p. 90). A system not only refers to its other and selects what is informative, but to do this, it must refer also to itself to select — give meaning to — what counts as a relevant past operation for the present and the next step. It has to construct its *memory*, all the redundancies on the basis of which it can be sensitive, or not, to novelty, variation and change:

> Memory is not simply a repertoire of past facts but above all the organization of access to information. This organization — and not really what happened in the past — is what leads to its use in concrete operations, which can only be executed in the present. (Luhmann, 2004, pp. 137-138)

A system has no other access to its own resources — to its own identity — than via distinctions and selections that it makes in the present, always anew. "Past and future facts can be attributed with meaning *arrived at in the present time*" (Luhmann, 2004, p. 118, emphasis mine). Luhmann clearly emphasizes the significance of the present in the sense that the past is only accessible via the present: the meaning of the past as the past significant for the present and structuring the present operations is constituted in the present.

"The recursive interconnection of operations follows neither logical nor rational rules," says Luhmann. "It merely produces connections and the prospect of connectivity" (Luhmann, 2018, p. 32). For him, "the system's boundaries are defined by the legal system itself, with the aid of a *recursive referral* of operations to the results of (or the prospects for) operations by the same system" (Luhmann, 1988a, p. 141, my emphasis). However, this analysis of retroactive meaning-bestowal shows that because such recursive *referral* of operations to past operations *only* selects them as

the relevant past of the present, the past is not simply there, available for repetition but there is rather a *deferral of meaning of operations to the future*. Only operations taking place in a present moment that is coming in the future can determine the meaning of past operations for that present. "Only the law can say what is lawful and what is unlawful, and in deciding this question it must always refer to the results of its own operations" (Luhmann, 1988a, p. 139); the results are not simply there, available in themselves, but become accessible as the past of the present only by a present operation of indicating them as such.

Furthermore, a decision seeks to control the future by treating it as changeable, that is, a decision presents itself as a *determining, binding* past of a future present, which it cannot, but will always try to, be. Normative expectations will be held according to this decision! Or, this is at least the self-description of a legal decision. However, it will, of course, also be the case in the future that future decisions will not be in any straightforward sense determinable by their past. The autopoiesis-irritating uncertainty gets repeated, and again a novel decision has to select a past relevant for it. This description characterizes the meaning of operations for next operations *as deferred*: no operation contains its meaning for next operations in itself, but the meaning is deferred to a future that selects it, paradoxically constituting the past *as* a significant past, as a past that limits possibilities *in* the present and with which it may simply "link." Autopoiesis must be thought of as both referral and deferral of meaning; that is, it must be deconstructed.

The legal system "thereby holds out the prospect of resolving conflicts (and at the same time makes it possible to seek out and withstand conflicts), for it contains a preliminary decision (however unclear it may be in the individual case) about who has to learn from disappointment and who does not" (Luhmann, 1988a, p. 140). Although the system's relevant past must be established each time anew, law nevertheless always takes itself as having made such a preliminary decision. And this must also be how the society receives the legal system, as consistent in its decisions, effectively protecting normative expectations and binding future – "must" in the sense that if society's faith in law begins to falter on a large scale, and if the legal system is unable to respond to this through modifying expectations, the conditions for its continued evolution are weakened. For Luhmann, the temporal paradox of the legal system's identity and decision must be concealed, so that the legal system's societal function can be maintained. Although the identity of the legal system can, from the theoretical point of view, be seen as constituted by a paradoxical temporality, this paradoxicality, Luhmann insists, cannot be visible in the legal practice itself. Law has to describe itself as unfolding sequentially, claim that its inconsistencies are consistent, its decisions based on binding past decisions and law already made.

3.4.3 Legal immunologic as the conditioning of social conflict

Legal decisions are called for as a response to social conflicts, and conflicts offer for the legal system an occasion for self-re-identification and -modification. Let us now

investigate how, for Luhmann, the legal system as an immune mechanism balances redundancy and variation in its attempt to condition social conflict.

Because communication is constituted retroactively and is dependent on the point of view of the receiver for its acceptance, understanding and continuation, it remains risky: the receiver might *reject* the initiative. Luhmann identifies this as a structural insecurity. Remember that, for Luhmann, communication is improbable, not a given, and its continuation is at all times faced with the risk that the receiver says "no," in which case communication cannot proceed (even if such a risk might be observed as low) (Luhmann, 1995a, p. 390). Such a "no" is what gives rise to a social conflict: "a conflict exists when expectations are communicated and the nonacceptance of the communication is communicated in return" (Luhmann, 1995a, p. 389). For Luhmann, a conflict has the structure of a contradiction between a communication that expects acceptance but is answered by a refusal, by a "no." This is not a simple failure of communication, but rather an irritation that pushes it to find alternative continuations (Luhmann, 1995a, p. 390).

The functional task of the legal system is to re-condition or re-enact conflicts in order to solve them legally and thereby enable social communication to continue (or if the parties to the conflict are singular persons, the legal solution to their conflict allows their interaction system, like family life, to continue). The legal system will understand conflicts and claims as of significance to it and will resolve them within the limits of its own selectivity. The legal system uses social conflicts as occasions for its own autopoiesis and for the formulation of legal expectations (Luhmann, 2004, p. 477; Teubner, 2001a). It must be remembered that, for Luhmann, law's function is not so much to steer behavior, to make deviant behavior less probable and prevent conflicts, but rather to offer the forum for deciding whose normative expectations have the force of law: it offers a medium for communicating about conflicts and avoiding their violent resolution. The legal system *conditions* conflicts, offers an "adequately complex" framework for their articulation and solution. The legal system is society's way of dealing with structural insecurity: the irreducible risk of contestation of contingent structures of communication that can always be otherwise and that are not necessary, that is, that can not-be. (See Luhmann, 1995a, p. 376, 379, 394.)

This conditioning of the conflict expresses the closure of the legal system that allows for a limited, legal perspective of social reality. The retroactive temporality is at play: law will reconstruct the conflict (who started it, how it unfolded, what it was about) in its own material, social and temporal terms, which allows for the resolution of the conflict in legal terms, for making it finite and lifting it from the infinite circle of double contingency. The code legal/illegal provides universal applicability to law by giving it the means to attribute itself to anything that irritates it and that it finds relevant. Attributing the code legal/illegal to any relevant communication can be understood as a second-order observation that observes first-order observers observing and that uses this observation as an irritation to formulate the legal perspective of the issue — formulating a legal observation that is "quite independent of the motives of the first-order observers" (Luhmann, 2004, p. 102). "*[I]f* law is to be used," Luhmann argues, (pointing out that this is of course not necessary but

alternative forms of conflict-resolution are often available), "that is, if there is a question as to law and injustice, it can be used only *on the terms set by the legal system*" (Luhmann, 2004, pp. 102-103, original emphasis). The legal system, Luhmann reminds us, "may well communicate *about* its environment but not *with* it" (Luhmann, 2004, p. 466, original emphasis). A conflict can only irritate law, not control how it is legally communicated about, and the legal system's sensibility to its environment will always be regulated by its sedimented patterns of selectivity. Luhmann writes:

> [I]t is important to note that law does not necessarily solve the original conflicts but only those that it can construct on its own terms. The deep structures of and motives for conflicts in everyday life, as well as the question of who commenced them, are largely ignored. This is one of the reasons why it is so difficult for the law to assess the effects which legal decisions, or legally enforced mediation, have on the situations that underlie conflicts. (Luhmann, 2004, p. 169)

The legal reconstruction of conflict will signify that there may be "a considerable degree of temporal [and material and social] disintegration in relation to the social environment" (Luhmann, 2004, p. 210) — and that *the law will be unable to gauge the difference between the two in any other terms than by observing its own ability to continue operating*. No matter how the conflict will be understood by the people involved in it, this understanding as such will be absent from the law, as the conflict registers within the law only in terms that the law itself provides (see Christodoulidis, 1998). As Günther Teubner puts it, "the *quaestio juris* has very little or virtually nothing to do with the original social conflict" (Teubner, 2001a, p. 22). What the parties to the conflict expect that ought to be done and what the law identifies as legal expectations may be totally incongruent, which implies that what law takes to be a conflict resolved may continue to be formulated as a conflict in other, non-legal terms. Law makes the conflict finite and decidable, but only in law's own terms. It does not necessarily do so in the eyes of those whose own understanding of the conflict differs from the one law provides. The distance between the legal resolution of the conflict and the "original" conflict is invisible for law; only an external observer is able to gauge it and interpret its significance.

Thus, "least of all [can the legal conflict resolution be understood] as a point-by-point response to impulses from outside" (Luhmann, 2004, p. 259). Legal responsivity is dependent on law's own understanding of the conflict and what is asked of it. This retroactive reconstruction of conflict that brings the conflict to *its own significance* — that is, to its own significance *in law's eyes* — implies a systemic presence of something that is constitutively absent. Law does treat the conflict as *coming first and as something other to itself*, as something that is observed *and then resolved*, although it can understand the conflict only within its own network. The meaning of the conflict is *deferred to law*, the conflict is received by the law according to its own *recursive referral of its operations* to its (past and future) operations. The system presupposes that the conflict itself is a social conflict and therefore outside the

law, but only understands what it is about when translated in legal terms. Law is not co-extensive with the world and it does not take itself as such, but simultaneously the only way for it to access what is outside and absent from the legal present is to make it present in law's own terms.

No system is absolutely self-sufficient but depends on the alter that always escapes the system's calculus of meaning-production. A social system of communication that discloses utterances as informative communication "validates" the utterer as a socially relevant speaker with a meaningful message that merits being considered for acceptance or rejection; yet, no such system reproduces itself without being affected by alter's response-triggering utterances. Socially meaningful subjectivity on both sides depends on alterity that remains unknown, a black box, and made transparent, understandable, only in terms that in no straightforward way originate in the alter herself. As Luhmann puts it: "Without 'noise,' no system" (Luhmann, 1995a, p. 116). All social systems, the legal one included, are, for Luhmann, "emergent realit[ies]" (Luhmann, 1995a, p. 111), making order from noise.

Law uses conflicts also for its own benefit, namely, to reproduce itself through the legal decision and the arguments provided for the decision that present a selective interpretation of the system itself. A conflict is an occasion of self-re-identification for law. Indeed, the immune response is not a determinate one, it is not wholly pre-programmed. It is a balancing act of known structures that regulate the system's responses and the novelty of the situation, which surprises the system and which it may deem as requiring a modification of the responsive structures such that communication can continue. The legal system will seek to deal with the gap between the social conflict and its legal conditioning, but, again, from its own perspective. Immunity is, as Luhmann puts it, a symptom of "the unknown causes of disturbances" (Luhmann, 2004, p. 476). To repeat once more: the difference system/environment is made within the system.

Thus, "[t]he system does not immunize itself *against the no but with the help of the no*; it does not protect itself *against changes but with the help of changes* against rigidifying into repeated, but no longer environmentally adequate, patterns of behavior" (Luhmann, 1995a, p. 372-373, original emphasis). When modifications of legal structures are called for is dependent on the legal system's own assessment of the situation which it faces. The legal system (just like a living organism) cannot have only a fixed and determinate set of possibilities of responding to conflicts, although it always has *some* set of possibilities that dispose it to respond in some ways rather than others. This set of possibilities must be open to transformation, to a controlled destabilization. Otherwise, the system would quickly become useless in a society that constantly changes. Conflicts and the immune response help the system to maintain its societal function. Immune mechanism (protecting normative expectations) is thus also an *auto*-immune mechanism that protects the legal system *from its own structures*, which risk becoming too rigid (Åkerstrøm & Stenner, 2020, p. 85).

> *One must guard against the widespread error of thinking that destabilization as such is dysfunctional*. Instead, complex systems require a high degree of

> instability to enable on-going reaction to themselves and their environment, and they must continually reproduce this instability – for example, in the form of prices that constantly change, laws that can be questioned and changed, or marriages that can lead to divorce. (Luhmann, 1995a, p. 368, my emphasis.)

Contingent social orders cannot afford too rigid structures that might put their existence at risk rather than securing it, and this applies to the legal system as well, even if its very function is to protect structures. "It [immune mechanism] is not simply a mechanism for correcting deviations and re-establishing the *status quo ante*; it must manage this function selectively, namely, must be able also to accept useful changes" (Luhmann, 1995a, p. 370). That is, when the legal system solves legal conflicts, it is not simply punishing the guilty and re-affirming the extant legal norms of expected behavior, but it will also modulate that structure, if and as it sees "useful."

3.4.4 Justice as deparadoxification

The immunologic is thus thoroughly ambiguous: in order to be able to continue to protect normative structures from threats, it needs to be ready (also) to attack these structures. In Chapter 4, we will look at a critique of this logic that has been presented in political theory, and how such critique motivates a certain turn away from the paradoxical legal order and an articulation of a politics beyond all law. In Chapter 6, we will see that Lindahl presents a theory of legal transformation that is in some respects very similar to Luhmann's immunologic. Lindahl, however, interprets this transformability in an explicitly normative and political key, as a feature of contested legal authority, while for Luhmann, it is, as we have seen, mostly functional.

There are, however, in Luhmann's theory of law as the society's immune mechanism some considerations of the role of justice and critique. Let us finish our exploration of the Luhmannian legal immunology and his theory of the legal paradox by analyzing how justice and critique figure within them.

For Luhmann, the legal system is the locus for distributing justice in modern society after references to natural law and absolute moral justice have lost their plausibility and effectivity as solutions to social conflicts. By implication, the legal system must exclude, or rather try to keep excluding, its own operations from being considered critically in terms of justice (Luhmann, 2004, pp. 213-214). "[H]ow can we rightly or wrongly differentiate the right and the wrong? At least under modern conditions we cannot avoid the issue. But it is also possible to unask the question and to transform the paradox into a less troubling issue" (Luhmann, 1988c, p. 154). As we now know, the justness of the framework for deciding questions of justice cannot itself be consistently answered within that framework. The system can offer no all-things-considered type of answers to critical questions. It cannot, or can only inconsistently, show that the operations for dealing legal justice are themselves just. This is the "blind moment of the blink of an eye" that allows for the legal vision of justice. Law operates

on grounds that it is unquestionably just to legally decide between what the law expects and what not, and that such decisions count as justice.

Clearly alternative understandings of what "justice" (even legal justice) might amount to in the situation at hand, and "functional equivalents" (Luhmann, 2004, p. 168) that solve the conflict, are always possible. Luhmann gives the example of "social dependence, for instance in a work situation, [that] often does not permit communication about actionable rights," and that therefore calls for alternative framing of the conflict between the employees and the employer, "establishing it as a permanent conflict in which all who are involved can take their chances" (Luhmann, 2004, p. 169). That the legal system takes itself as the privileged site of justice in society may itself raise claims to injustice. One only needs to think about indigenous peoples' refusal to be considered members of a colonial state and thus to view its legal system as the locus in which to present their claims of justice. How can it be, however, communicated to law that its perspective on its environment and the legal distribution of justice are only contingent, that they exclude alternatives in a way that law can never justify in any absolute sense? With what right does law distinguish here between right and wrong, thereby boldly identifying its decision and justice? That there are alternative institutional conflict-resolution methods and subsequent legal forums on which one may re-open one's case can be understood as institutional attempts to deparadoxify this paradox, to seek to deal with it in a way that answers the concerns that the legal system's ungroundedness evokes in society, thereby managing its foundational paradox.

The significance, for Luhmann, of legal critique, the raising of the Third Question and the communication of contradictions must be understood within the immunitary paradigm (Luhmann, 1995a, p. 371). "Evolution proceeds by undecidabilities," he states, repeating the point that paradoxes have creative value for systems. "It uses the opportunities that undecidabilities sort out as opportunities for morphogenesis" (Luhmann, 1995a, p. 361). A conflict has the structure of a contradiction (the simultaneity of "yes" and "no"), and "contradiction has a double function in all self-referential systems, namely, to block and to trigger, stopping observation that encounters contradiction and triggering connective operations that cope with contradictions and owe their meaningfulness exactly to this coping" (Luhmann, 1995a, p. 361). Critique irritates and disturbs the operation of the legal system – and if it does not do so, it fails to register within the law altogether – and it can "nudge" the system to transformation (that the system, to be sure, itself controls). It is not, Luhmann stresses, that the law will now know the society better, but only that it has, according to the logic of autoimmunity, modified its internal complexity (its structures of normative expectation) with which it aims to better fulfill its societal function in the future (see Luhmann, 1995a, p. 372). Such an estimation is, of course, itself risky.

Law operates on grounds of its autopoietic closure, but it must try to be "adequately" sensitive to its environment, to resonate with its changes in some regulated ways (Luhmann, 2004, p. 219). Of course, there is no neutral, non-self-referential way for the legal system to observe whether its conception of justice truly

is "adequately complex" (see Luhmann, 2004, p. 219), whether it is able to adequately respond to the conflict. It can only judge this adequacy by observing its *own* ability to continue to operate after the judgment. The ability to continue to operate can again be counted as invisibilization of the law's paradox. As long as the law can keep on functioning, the paradox poses no problems but only makes the system's particular perspective and autonomy possible.

Justice is, in Luhmann's scheme, a reflexive concept that expresses the legal system's attempt to make decisions that are *both consistent and responsive* to the environment (see Luhmann, 1988a, p. 141). Legal decisions do not simply answer to a conflict in (what the decisions understand as) its factual singularity. Rather, they react to the conflict by attempting to satisfy the expectation of legal consistency, that is, the requirement that equal cases ought to be decided equally and unequal cases unequally. Justice as the law's "formula for contingency" (Luhmann, 2004, p. 214) suggests that law needs to combine two demands that are difficult to reconcile: redundancy, or "equality" and legal consistency, and variety, or "responsiveness."

First, the legal system must meet "the requirement that consistent decisions be made" (Luhmann, 2004, p. 219). It preserves legal consistency in seeking to find ways of treating equal cases equally and unequal cases unequally. It must preserve its redundancy, entrench its selective indifference to environmental complexity by referring the new and singular case to the already known cases. It must show that there is an already existing rule with which the case can be solved. The legal system tries to meet the normative expectations that law will serve justice by making consistent decisions. Luhmann thus boldly concludes: "If justice is given by the consistency of decisions, we can also say: justice is redundancy" (Luhmann, 2004, p. 319).

Within the immunological paradigm, however, the paradoxical temporality of which we have just been at pains of analyzing, justice cannot, when observed theoretically, simply be about legal consistency. As a self-description of the immune system of society, "justice as redundancy" hides beneath itself the paradox. Redundancy can be contrasted to the actual new information that is subtracted from what is already known, but also to *variety*, to the system-internal possibilities of communication that the system may need to modify in response to irritations. The value of consistency and justice as redundancy need to be combined with autoimmunity, that is, variation, learning from irritations by modifying the expectational structures. This modulates the system's selective sensitivity to its environment. Variation can mean the creation of new rules or occur, for example, as analogical reasoning, generalizing an existing rule to cover new cases (Luhmann, 2004, pp. 219-220, 319-320).

As an evolutionary totality, the legal system must maintain itself as a relevant conflict-solver in modern society. It must seek to have adequate levels of internal complexity, not in order to mirror society point-to-point, but in order to be, generally speaking, prepared to meet social conflicts in ways that allow for their legal resolution. After all, the system is contingent and historical, which means that its redundancy is "without a final reason for its being as it is" (Luhmann, 2004, p. 318). Because of this, it needs to constantly balance between the need to stay "relevant," on the one hand,

and its indifference to environmental complexity, on the other – indifference, which both makes its particular perspective possible and may put it at risk of ignoring something that may later turn out to harm legal autopoiesis. An example of such harm might be the inability of the legal system to recognize the difficulties of workers, who are dependent on their superiors for their livelihood, to express wrongs they encounter at their workplace in legal terms. The legal system's inability to create new legal norms that seek to instantiate such general principles as social rights adequately to new forms of labor, may lead, besides the continuation of social injustice, to side-tracking the legal system. The court and "hard law" as the important loci for conflict-resolution in society might be supplanted by non-litigable, non-legally binding "soft law" (see Christodoulidis & Dukes, 2008, pp. 417-421).

This implies that critical claims to justice addressed to the legal system may well irritate the system to renew itself, to distribute the code legal/illegal in a way that the system has not done before. But, to repeat once more, this renewal must be presented and narrated as built on redundancy and closure, and thus consistent with the system's past. Luhmann focuses on the ways in which the legal system (like other systems) seek to make its biased reality-constructions as unproblematic for themselves as possible. There is no other way for the system to access reality than a biased one, which implies that there necessarily is some loss in how the irritating "something" is received and responded to by the system, although that loss would only be visible outside the law. The only way for the system to know whether its decisions are adequate or not, whether justice has been done or not, is to observe its own continued ability to operate. Justice as a formula for contingency is, for Luhmann, deparadoxification, overcoming the system's inoperativity and its critique by auto-immune destabilization of its extant structures for the sake of the continued existence of the system itself.

3.5 Conclusion: Legal evolution as deparadoxification

Let me now wrap up this chapter by detailing once more Luhmann's paradoxico-evolutionary orientation to totality, the importance of deparadoxification and how Luhmann's account only displaces and carries with it, rather than resolves, the paradox. We may conclude that for Luhmann, the legal system is constitutively paradoxical, but a distinction then needs to be made between the theoretical (or critical), second-order observation and those meanings and self-descriptions that the legal system has given to itself and of itself in its operation. The latter are ways of attempting to deparadoxify what the theory can at all moments identify as a paradox. "Becoming paradoxical means losing determinacy, thus connectivity for further operations" (Luhmann, 1995a, p. 34), so the thematization of paradoxes at the level of the system's operation must be avoided.

Remember that the leading distinction *Recht/Unrecht* has a double meaning: it means both legal/illegal, which for Luhmann is the code, the basic distinction that the legal system uses in its operations and in order to observe something; it also means

law/non-law, the distinction between the legal system and its environment. The legal system is nothing but its difference from what it is not, and it itself differentiates itself from what it is not — it itself decides what is law and what is not — in and through the use of the code legal/illegal in its operations. The code legal/illegal is always applied within the legal system; it has "re-entered" the distinction law/non-law (legal system/environment) on the side of the law. The legal system is, structurally speaking, an inclosure paradox.

Now, the first-order observation is blind to the distinction that it uses, and this applies also to law. "One has to apply this distinction even though one can neither ask nor answer the question (because it would lead to a paradox) as to whether the distinction between legal and illegal itself is legal or illegal" (Luhmann, 2004, p. 177). This is law's own distinction that allows it to differentiate itself from all other social systems using other codes (and every other communication in society). To ask about the legality or illegality of the form legal/illegal is to ask, whether the use of this distinction is legal or illegal, that is, whether law itself is legal or illegal. The same distinction cannot consistently both be used and observed with itself. Trying to do that will end up saying that law is legal or law is illegal: a tautology or a contradiction. The "wounding" of the world with the distinction law/non-law can admit neither the stable value legal nor the stable value illegal: "[l]aw, in other words, cannot [consistently] prohibit or sanction its own use" (Luhmann, 2004, p. 178). All social orders, the legal system included, are ultimately grounded on nothing else than on "an arbitrary distinction, a contingent split on the world's surface" (Clam, 2000, p. 70). The split opens the possibility for the self-referential operation of the order, and thus makes the allocation of legality and illegality possible. For this very reason, it cannot itself admit of any absolute value. A paradox emerges, when the conditions of possibility of an operation are at the same time its conditions of impossibility (Baraldi et al., 1999, p. 131; Luhmann, 2004, p. 182).

However, the paradox "can be understood as an inducement, even a compulsion to solution. This means: as a challenge to reconstruction with the help of distinctions that enable stable identification" (Luhmann, 1998, p. 112). Paradoxes are not simply paralyzing but also productive: "paradoxical communications [are] deframing *and* reframing, deconstructing *and* reconstructing operations" (Luhmann, 1995b, p. 41, my emphasis). Paradoxes push toward creative solutions and responding to the same key question in meaning and information production: how can an abundance of possibilities and unmanageable complexity be turned into an improbable distinction between a choice and excluded alternatives? How can a certain selection of behavioral possibilities be normalized in exclusion to others and over time? In a way, the problem of unmanageable complexity, for Luhmann, already contains its own solution: "Complexity [...] means *being forced to select*" (Luhmann, 1995a, my emphasis). Orientation becomes possible only as a response to a "primal injunction" (Schiltz & Verschraegen, 2002, p. 58): Draw a distinction! Select! "Draw a distinction, otherwise nothing will happen at all," Luhmann warns: "If you are not ready to distinguish, nothing at all is going to take place" (Luhmann, 2006, p. 43). The only medicine for the ills of the paradox is to redraw distinctions — which, to be sure,

is itself paradoxical as all distinctions are unities in difference, but, perhaps, for a while at least, the new distinction will not invite critical observation and bother the system's autopoietic evolution.

To critical questions, then, the legal system will answer self-referentially, yes, but it will try to make these answers socially meaningful (from its perspective) and hide their self-referentiality. It has an arsenal of deparadoxifying and detautologisizing techniques at its disposal, and indeed it will evolve as looking after ways of making itself seem internally consistent, just and socially relevant. Temporalization is again central here, as are law's ideologies, self-descriptions and narratives of its environment. Law not only uses the code but also programs how the code is to be used. As noted above, the abstractness of the code generates uncertainty upon which legal autopoiesis feeds. It forces the law to specify the conditions in which the code is rightly applied. The immutability of the code is supplemented by programs that vary (Luhmann, 2004, p. 192, here Luhmann explicitly refers to Derrida's notion of the supplement). Programs allow law to give an account of the social facts (other-reference) that are relevant for it and allow it to recognize when normative expectations are not met (Luhmann, 2004, pp. 197-199). They introduce the supplementary distinction, namely the one "between right and wrong application of the criteria for the attribution of the values legal and illegal" (Luhmann, 2004, p. 205). What we achieve with programming, then, is the invisibility of the paradox of the code legal/illegal, because programming now regulates when to prefer the legal and when the illegal side of the code. The "answer" to the paradox can only be its *temporalization into a chain of episodes* (Luhmann, 2004, p. 208): deciding what counts as the right application of the legal code in the situation at hand.

Programs are not, however, enough to allocate the code, but another supplement — *the legal decision* — is also required. Recall here the discussion of the deferral of meaning in the autopoietic referral of operations to past operations. Conditional programs, Luhmann explains:

> refe[r] to past facts, which are stated in the present. This can include legal facts, for instance, by means of the question whether a statute has been passed validly and if so when. Here it is crucial that the attribution of the values legal and illegal *depends on what can be treated as past at the moment of the decision*. In this respect law always operates as an ex-post-facto [...] system. (Luhmann, 2004, pp. 197-198, my emphasis.)

That a legal decision cannot be determined by the past implies that it is a supplement in Derrida's sense: the redundancy and force of the past "lack" force until the moment of the decision that selects the past as obligating. The legal decision is needed as a supplement for the conditional programs; programs – structures of normative expectations – do not have the force to determine the right application of the code without it (we knew this since Wittgenstein!). The *legal process*, thus, is the supplementary site for the determination of the right application of the legal code and for the unfolding of its paradox.

The prohibition of the denial of justice (see Luhmann, 2004, p. 279) — the obligation of the courts to deliver a decision in a case in front of them — also functions as a mechanism of unfolding the paradox. Law deals with its paradox by *forbidding its own inoperativity*, by making the drawing of a distinction (i.e. its condition of possibility) into a legal obligation. Interestingly, this prohibition allows for a legally regulated version of inoperativity. "The legal system," writes Luhmann, "has been provided with the possibilities to delay decisions and to operate with uncertainty for a while," that is, during the court proceedings (Luhmann, 2004, p. 205). In a way, the court provides an opportunity for the law to observe its code as a unity during a period of self-regulated inoperativity – inoperativity in the sense of temporary suspension of the choice between legality/illegality. Luhmann even calls the uncertainty of the allocation "the third value" that supplements the rigid binary code legal/illegal: "the paradox of the unity of the difference between the legal and the illegal is [...] solved [...] by defining the code as a unity through the value of the uncertainty of the decision" (Luhmann, 2004, p. 207). So, once more, another supplement for unfolding the paradox. The list of supplements could be continued: the distinction between procedural and substantive law (Luhmann, 2004, p. 207) that allows formulating both the right application of the procedure and the right identification of the content of the law. Law will also deal with the rightness of its norms by assigning them the value of validity (Luhmann, 2004, p. 122 ff). Norms have been formulated in normatively regulated processes that only will make them legally valid, and only in such processes can this value be withdrawn from them. Another supplement, then: legal validity.

To its critic who questions the rightness of the application of the code, law can then respond: "Hold on, let us investigate how the code is rightfully applied! Give me some time to understand who you are and what you are saying, and prepare my response!" This self-regulated, temporary inoperativity is required for the decision to be (legally) *just*. Law will give itself time to construct a mapping of its environment and situate itself within it, spelling out what belongs to itself and what belongs to the non-self, the environment, what of the environment is relevant to its operations. It does all this from its own perspective, which already presupposes and does not efface the cut between the system and the environment. "The system/environment distinction occurs twice over: as difference *produced through* the system and as difference *observed in* the system," Luhmann reminds us, once more reformulating the notion of re-entry (Luhmann, 2012, p. 19, original emphasis). The legal decision will be a self-produced answer to the critic, and the law will not see any difference between itself and justice, which of course remains a possibility for the critic. Reaching a just decision takes time, but only the finite time of the legal decision. But at least the straightforwardness of the code has been spun into a whirlwind of supplements, and (defeasible) arguments can be given for why it is applied as it is applied. Selections are needed to produce finitude, to help overcome the infinity the paradox suggests.

"Observed as a paradox," Luhmann writes, "*any* form symbolizes the world" (Luhmann, 1999, p. 18, original emphasis). That is, as a unity of what is different, any form symbolizes the infinite complexity of the world that does not offer paths for orientation unless a choice is made, the world rendered asymmetrical and a finite

order established. “[P]aradoxes do not originate (inevitable) vicious circles, but such circles will result from unsuccessful attempts to deparadoxize” (Luhmann, 1990a, p. 137). The indicating distinction that makes the observation of something as something possible, drags the “rather than something else,” i.e. the excluded and the marginalized, unavoidably with itself, but suspends its relevance for the observation in question. This solution to the paradox is only a “solution,” as it does not eliminate the paradox — a paradox is not a mortal Medusa — but only suspends it for the benefit of identification of something as something. A distinction both is a paradox that halts communication, and a selection that enables communication (see Philippopoulos-Mihalopoulos, 2006, p. 224).

The paradox is Euryale that is not looked at, but something else must be observed instead. The paradox does not disappear, Euryale can still turn her unlucky observer into stone, but a distinction between levels of observation is made. The distinction is not thematized by the system itself and observed as a distinction, but rather is *only used* in operations: “Observation has to operate unobserved to be able to cut up the world” (Luhmann, 1995b, p. 46). “Observing systems” has a double meaning: it can mean second-order observation, observing the observer and, thus, the unity of the distinction and the paradox, or it can mean first-order observing, observing something meaningful in the world that is blind to the paradoxical distinction it uses (Luhmann, 1995b, p. 43).

Luhmann’s metalogical preference is inconsistent completeness, but he argues that systems always (implicitly) prefer consistent incompleteness for the sake of the continuity of communication. Unlike the classical constructivists, Luhmann does not claim that the paradox would thereby be eliminated. What the system needs to do “is not to avoid paradox or tautology but to interrupt self-referential reflection so as to avoid *pure* tautologies and paradoxes and to suggest meaningful societal self-descriptions” (Luhmann, 1990a, p. 136, original emphasis). For Luhmann, it is an observable fact of sociological evolution that functional subsystems are forced to seek to appear consistent to themselves and to other subsystems. The cost of the failure to do so is the inability to operate, which is counter-productive for functional evolution. However, the evolution of subsystems by deparadoxification as the drawing of supplementary distinctions can itself be observed to be paradoxical. But Luhmann insists that any observation of a paradox must also pay attention to how the paradox is unfolded (Luhmann, 1996, p. 101). Paradox and its unfolding are two sides of the same coin. So, if the constitution, programs, decisions and the contingency formula of justice are all ways of dealing with the foundational paradox of the code legal/illegal, they only displace the paradox to themselves. This does not necessarily count as a mere repetition of the problem elsewhere. The sociologist can observe whether deparadoxification succeeds in determining the “natural” conditions for the distribution of the code, that is, conditions that the legal system does not doubt or put into question (see Luhmann, 1996, pp. 100-101). Deparadoxification helps to determine how the code is correctly, unproblematically and consistently applied. It effectively suppresses the Third Question and fundamental critique of the legal

system. Unfolding of the paradox, if successful, at least temporarily turns the contingent into a social necessity.

For Luhmann, then, the naturalization of the conditions for the application of the code legal/illegal is an evolutionary achievement. The legal system owes its stability to such artificial naturalization of its contingent origins. Avoiding the exposure of the paradox, and overcoming it when it is exposed, is a priority if meaningful and informative communication is to reproduce itself. As, for Luhmann, "[t]he point from which all further investigations in systems theory must begin is not identity *but difference*" and since paradox is the form of *unity* (even if a unity of a difference), we cannot stay in it (Luhmann, 1991, p. 75; Luhmann, 1995a; Luhmann, 2012, pp. 28-29). Or at least we have to *imagine* that we are not staying in it, for the supplementation that "solves" the problem does so always in a somewhat illusionary manner (Teubner, 2006, p. 50).

"Nothing, of course, is paradox per se — not the world, not nature, not even self-referential systems" (Luhmann, 1990a, p. 247). Paradox *is* not, it is not a being or a thing, but an observation and a description of something (distinction) as something (as a unity), and for this reason, it can also not be looked at. Euryalistics is possible, for Luhmann, because everything that exists, exists in the actuality, and in the actuality different operations can take place and different observations at different levels can be made. "To call something a paradox," he argues:

> is nothing but a description, and it is appropriate only if one wants to draw conclusions or use other ways of long-chain reasoning. Paradoxes are obstacles only for certain intentions. [...] The question of the ultimate meaning [e.g., with what right is the distinction between right and wrong made?] can be raised at any occasion — but not all the time. [...] Then, society develops *forms* of coping with this problem, of answering this question, *forms that deparadoxize the world*. (Luhmann, 1990a, pp. 147-148, original emphasis.)

It has in fact been said that "systems theory evolves around the problems created by the paradox of the blind spot" (Stäheli, 2012, p. 115). Luhmann's art of not looking at the paradox is motivated by his evolutionary functionalism, which means that he unwaveringly prefers the side of autopoiesis of the distinction autopoiesis/inoperativity.

> Paradox makes the observer oscillate, that is, to swing very briefly (but still: for a short duration) between an assessment and its contrary. But if one takes the position of a second order observer, one can simultaneously observe how a first order observer comports himself, how he makes his paradox invisible for himself, how he replaces and adjusts himself through distinctions, how he changes indeterminate complexity into determinate complexity and thereby makes his information loads finite. The second order observer is by no means obliged to do the same. But at least he can see that it is possible, and *maybe he is enough of a functionalist to keep looking for other, functionally equivalent*

solutions to the problem. (Luhmann, 1991, p. 71, my translation and emphasis.)[36]

The functionalist priority is to keep communication operating, and to this end the invisibilization of the problematic paradox is necessary. This is also what motivates Luhmann's self-distinction from deconstruction and the way in which Derrida, according to Luhmann, only attends to how paradoxes deconstruct assumed certainties, without paying due attention to how dealing with them fuels societal meaning-formation in functionally specialized systems. Luhmann may, however, not be as far from Derrida as he would like to be insofar as he resorts to the notion of the supplement to describe the art of not looking at the paradox. But we should not infer too much from this: Luhmann's functionalism also succeeds in drawing a credible distinction between the two paradoxologies.

[36] "Die Paradoxie lässt den Beobachter oszillieren, nämlich ganz kurz (aber immerhin: kurzzeitig) zwischen der einen Feststellung und ihrem Gegenteil pendeln. Wenn man aber die Position eines Beobachters zweiter Ordnung einnimmt, kann man zugleich beobachten, wie der Beobachter erster Ordnung sich verhält, wie er sich seine Paradoxie invisibilisiert, wie er sich durch Unterscheidungen ersetzt und verstellt, wie er unbestimmbare in bestimmbare Komplexität umwandelt und damit zu endlichen Informationslasten kommt. Der Beobachter zweiter Ordnung ist dann keineswegs gehalten, es ebenso zu machen. Aber er kann wenigstens sehen, dass es möglich ist, und vielleicht ist er Funktionalist genug, um nach anderen, funktional äquivalenten Lösungen für das Problem Ausschau zu halten."

4. Paradoxical law, politics and the problem of nihilism: Luhmann and Agamben

4.1 Introduction

In this chapter, I turn to the analysis of the relationship between law, paradox and politics, and will do so by reading together two very different thinkers: Luhmann and Giorgio Agamben. I will argue that Luhmann's and Agamben's positions are diametrically opposite: the first prefers the self-perpetuating legal system that ultimately absorbs all politics without notable remainder, and the second argues for a "messianic" politics that deactivates all relations to law in order to render its inconsistent operation inoperative and bring the law to its "end." I will thus contrast Luhmannian paradoxico-evolutionary orientation to Agambenian paradoxico-criticism.

Let me shortly recap the Luhmannian position in order to motivate the task for this chapter. If we choose to observe the legal system as an inconsistent totality, that is, as based on the use of a distinction between legality and illegality the value of which remains undecidable within the system itself, and if we also choose to follow Luhmann's account of this paradox, we see that the system seeks to protect itself against this constitutive inconsistency by developing different mechanisms and strategies (the constitution, programs, justice as the formula for contingency, etc.). However, as we saw, the retroactive temporality involved in the establishment of legal consistency itself reproduces the inconsistency despite its best efforts to hide it. The consideration of the legal system as a temporally operating and developing system destabilizes the legal value of each particular moment. The non-linear temporality of retroactivity is at odds with the linear temporality suggested by legal consistency (that first there is a valid legal norm, then there is a legal decision made on grounds of that norm). This is by no means necessarily a problem for the law's capacity to operate, but, as Luhmann argues, rather the way in which it operates. Because the attempts at invisibilization cannot efface the inconsistency, the legal system defends itself against its internal threat by means that reproduce this threat.

In this chapter, we shall continue the analysis of this paradoxical logic. Luhmann's paradoxico-evolutionary, functional approach to legal totality emphasizes, above all else, the *self-preservation* of the functional system. Law functions as an immune system of society that seeks to condition social conflicts, and this immune function also implies an auto-immune relation of the law to itself. The legal system needs to maintain itself as adequately complex vis-à-vis its constantly changing environment and vary normative expectations in order to maintain its social relevance. The emphasis on deparadoxification implies that the inconsistent system is dynamic

and capable of transforming itself, but transformation is always geared to preserving the system itself in operation.

We will see that this immunitary logic presents a problem for a theory of the legal paradox in a political register. I understand *politics* here to mean not the society's political institutions to which Luhmann seems to reduce politics. I understand it rather as the thematization and challenge of the paradoxical limits of a social system, like the legal, economic or the political system, that seeks to expose the inability of the always contingent and historical system to consistently legitimate its own operation and the ensuing illegitimacy and even violent imposition with which it operates in the society it claims to serve.

The problem that the immunizing structure of the paradoxical legal system poses to politics is law's constitutive inability to "respond" in any direct way to reflexive, political claims. To the same extent that the legal system is "open," "responsive" and "hears" the claims that it has, in the past, been unjust, and modifies itself accordingly, it is also "closed," "unresponsive" and "deaf." That the legal system functions as an immune system for society implies a *fundamental ambiguity*: on the one hand, the system must be dynamic and transformable, and hence in principle open to political claims for change. On the other hand, this transformability is subordinate to the system's self-preservation, and thereby necessarily limited.

If the legal system constructs a self-centered account of its environment and regulates how it allows "the real" to irritate itself, modifying itself in response with a view to its own self-preservation, what independence can be given to "the real," that is, to those challenges that *resist* their reception by the system, even if the system is, from *its own* perspective, "adequately responsive"? It will be my argument that Luhmann's functional-evolutionary theory of paradoxical totalities risks becoming utterly *nihilistic*, that is, a mere description of how functional systems perpetuate themselves and their instrumental rationalities simply for the sake of self-perpetuation, effacing from view any normative and substantial claim that does not fit with their account of "reality."

The chapter is divided into two parts. The first part discusses Luhmann's epistemological constructivism and its difficult relation to "ontology," immunologic and conception of politics. I begin with a short account of Luhmann's constructivist epistemology that balances a fine line between minimal realism and nihilism for which any extra-systemic reality remains unknowable and simply counts as nothing. I then explore in more detail Luhmann's take on the immune system of law and how he sees politics confined only within the institutional political system. The notion of the immunologic also opens Luhmann's theory to contemporary political theory, in which this logic is analyzed as paradigmatic of the ambiguity of the modern notion of sovereignty: how it claims to protect the commonwealth against threats, but becomes thereby itself a threat to it.

In the second part, I develop the theme of nihilism further with Agamben. He offers a detailed account of modern law both as a paradoxical totality and as utterly nihilistic. Whereas Luhmann sees in the paradox the impetus for its invisibilization and the system's evolution, Agamben seeks to expose all attempts at making the

constitutive inconsistency inapparent as mere juridical fictions in the contemporary conditions of biopolitical nihilism, in which the "state of exception" has become the norm. Agamben's solution to this contemporary legal-political nihilism is wholly other, "messianic" post-juridical politics: politics that seeks to render inoperative the very exhausted and inconsistent legal system and that de-activates all relations to law.

The methodological limitation to focus on the notion of paradox applies also to my reading of Agamben: I concentrate on analyzing how Agamben sees the relation between the paradox and modern nihilistic law, leaving aside much of the details of his analysis.

4.2 Paradoxico-evolutionary orientation to legal totality and its relation to politics

4.2.1 Luhmann's epistemological constructivism, nihilism and "a reality that remains unknown"[37]

As we already noted in the previous chapter, Luhmann's epistemology is constructivist. There is no point-to-point mirroring between a system and its environment, but the system constructs its own knowledge of its "reality" and is unable to pull itself up by its own bootstraps, so to speak, to observe whether its knowledge corresponds, or not, to how things "really" are. The crucial question then is whether, and if yes, how, such systems that can only access reality via the mediation of their own construction can in any way acknowledge that this inaccessible reality is *not* reducible to their own constructions of it.

The roots of Luhmann's notion of "constructivism" are in mathematics (Luhmann, 1990b, p. 65). As a mathematical term, constructivism refers to the view according to which mathematical objects need to be "found" or "constructed" for them to exist. In the Introduction (1.3.4), we defined constructivism with Badiou and Livingston as an attempt at tracing the limits of thought, language and knowledge that "sets forth the norm of existence by terms of explicit constructions" (Badiou, 2006b, p. 55): only what can be named exists. Only those objects that can be positively named in a mathematical language can be said to exist, and mathematical knowledge is possible of them alone.[38] (As we will see in the next chapter, this is precisely the view against which Badiou presents his notion of "truth" and transgressive politics as a "truth procedure.") It seems to me that insofar as Luhmann is, as some of his formulations that we will look at below suggest, a pure constructivist who abandons all consideration of the significance for systems of what they cannot access, his

[37] The last part of this subtitle refers to Luhmann's essay "The Cognitive Program of Constructivism and a Reality that Remains Unknown" (Luhmann, 1990b).

[38] As we have already seen above (3.2.1), Luhmann is not, however, a traditional constructivist, as he recognizes the existence of the paradox, which makes the constructivist policing of the boundaries of a knowledge ultimately inconsistent.

position is vulnerable to a nihilism, that is, to the claim that only what a system can name and recognize, exists for that system.

It must be noted, however, that Luhmann does not deny reality independent from epistemological constructions in the sense that he does not explicitly argue that reality simply collapses into the internal productions of social subsystems. He does not wish to be a naïve idealist. He rather only maintains that "we have no direct contact with" reality (Luhmann, 1990b, p. 64). The existence, or not, of a cognition-independent reality is simply undecidable, because everything that we can know about it is mediated by systems (biological, conscious and social) (Luhmann, 1990b, p. 67). Closure from reality is the precondition of openness to reality:

> Without knowing, cognition could not reach the external world. In other words, knowing is only a self-referential process. Knowledge can only know itself, although it can — as if out of the corner of its eye — determine that *this is only possible if there is more than only cognition*. Cognition deals with an external world that remains unknown and has to, as a result, come to see that it cannot see what it cannot see. (Luhmann, 1990b, pp. 64-65, my emphasis.)

In other words, knowledge must *presuppose* that it is knowledge *of* knowledge-external reality, although knowledge of this reality is self-referential. Knowledge is knowledge *of* reality that it represents *as* this or that in its system-internal operation. I argue, however, that Luhmann's constructivism does not give enough weight to this distinction between "of" and "as" but rather chooses the side of "as" (that is, system-internal cognition). His account thereby risks becoming nihilistic and undermining its own argument that it is not a form of idealism and that system-specific cognition is not all there is. The quote above implies an *ontological* account, which we could call "minimal realism." However, Luhmann's explicit denunciation of all ontology in favor of epistemology, which we will explore below, undermines this realism. Such minimal realism is crucial, I further argue (more fully only in the Conclusion), for a critical legal theory that wishes to avoid an utterly nihilistic account of the legal system.

Let us begin with Luhmann's rejection of "ontology." William Rasch has pointed out that "for Niklas Luhmann, ontology is not a perennial puzzle to be solved anew, but a historically-determined category to be dismissed" (Rasch, 2012, p. 85). Luhmann conceives of his own constructivist position as a quintessentially modern one, enabled by the collapse of pre-modern realism that still operated with the ontological distinction being/non-being (Rasch, 2012). Indeed, Luhmann argues that his constructivism must be described as "a *de-ontologization of reality*" (Luhmann, 1990b, p. 67, original emphasis). The cognitive program of constructivism rejects as valid the distinction being/non-being and operates with the distinction system/environment instead. Modernity rejects, Luhmann argues, the value of ontology the defining feature of which is the belief in the complete, hierarchically ordered social reality or being with the Absolute, Transcendent Being, God, as its secure ground (see Luhmann, 2013, pp. 185-190).

In Luhmann's sweeping analysis, premodern ontology had its equivalent in the premodern social hierarchy. There is within premodern, stratified social reality a "second-order observer" position equivalent to God, like the aristocratic court (in distinction to peasants) or the city (in distinction to the periphery) from which the social whole, being, can be observed. Such a position itself is not a being among others and thus cannot be observed and questioned within society. The paradox of the unity of the distinction "being of the social whole" / "non-being of its outside from which it can be seen as a whole" cannot become visible, because no further metalevel observer can be imagined that could observe this distinction. The omniscient observer is absolute, constitutively incapable of being observed as an observer. Rasch vividly describes this premodern structure:

> One is reminded of Adorno's and Horkheimer's image of Homer's noble landowner, Odysseus, who surveys the campfires of his sheep herders from his castle walls. He alone can discern the complete pattern of lights these campfires project within his field of vision; he alone can see that this terrestrial pattern reflects perfectly the light produced by the celestial harmony of the fixed stars and their regularly orbiting satellites. He alone immanently represents the transcendent, omniscient demon. But he cannot see the historical and social condition, the "eye" of his privileged situation that allows him this view. (Rasch, 2012, p. 90)

This is a perfect image of what we called in the Introduction the onto-theological orientation to totality that is still capable of entertaining the possibility of a complete and consistent whole. Being can be imagined as such a totality, *because the observer of this whole remains unobserved, not a being in its turn, and thus unproblematic*. The omniscient demon is the point of view from which the campfires can be seen as a patterned whole, but that itself remains invisible. Being is what exists within the comprehensive, well-ordered whole; non-being is simply what does not belong to this whole but "is" the point beyond being from which being can be observed (see Luhmann, 2013, p. 185).

In Luhmann's account, modernity problematizes and de-absolutizes the concept of second-order observation, which ultimately makes ontology obsolete. Now second-order observation no longer means simply a faithful, omniscient mirroring of an objective reality that makes the observer itself invisible. Rather, the contingent and historical nature of such observation, or reflection, is exposed, that is, it becomes evident that whatever knowledge there is of reality, is relative to an observer-position, to a systemic, non-absolutizable and limited perspective. The observer becomes observed – and thus a being – in its turn. "Unlike the fixed and final reflection of our omniscient demon [...] these second order reflections cannot, in theory, be limited, for every reflection may now be subjected to a further reflection, every observation to another observation" (Rasch, 2012, pp. 91-92). There is now a plurality of limited observers who can each be a second-order observer and observe other observers and see what they cannot see. In other words, the self-implicative nature of observation

becomes itself visible, and this destabilizes the distinction being/non-being. Observation of reality can no longer be conceived as mere mirroring of the divine structure of being. The distinction being/non-being becomes obsolete, because knowledge is conceived as a construction that has no correlate in the "real" reality, which remains unknowable, or accessible only via systemic mediation. One must now always ask *who* it is, which system, that observers and constructs knowledge. As in each observation of reality the mark of the observer is now visible for other observers, the distinction being/non-being loses its significance, and the new guiding difference is the constructive one: observer (system)/environment. In the phrase "knowledge of reality as something," the "as" receives all the weight and the "of" becomes less and less significant.

Nihilism can be understood as the modernity-characterizing view that extant forms of system-centered reflection are all there is, given that reality as such can no longer be accessed. It is the opposite view to onto-theology: while the observer beyond being guarantees the autonomy of social order from the (human) beings it regulates, in nihilism the observer becomes a being among other beings on which all order is dependent. The importance of "as" fully overcomes the importance of "of." There is no reality as such that we could reach – nor, for that matter, any independent normative ideals of justice or right that could guide us. What is unobserved, excluded from the system's constructions and of which the system in question can know nothing simply counts as nothing for it. All knowledge and all values are system-specific and constructed by them. Because reality *per se*, the Kantian Thing-in-itself, has lost plausibility and been itself reduced to a state of undecidability, we are thrown fully to constructivist epistemology. Reflection "can and must not ground itself [or: stop at] anything beyond itself, and in *this* sense it becomes nihilistic," Werner Stegmaier notes in his account of Luhmann's constructivism as precisely nihilistic. In this sense of constructive epistemology, nihilism is not an end of philosophy but rather its new, modern beginning (Stegmaier, 2016, p. 43, original emphasis, my translation).[39]

Nihilism is the exposure of the radical self-referentiality of knowledge, or more generally, of closed systems as centers of meaning-production and communication as such. If premodernity could still prioritize the distinction being/non-being, because it could not conceptualize second-order observation as an observation (as a distinction) but only as an absolute, invisible and transcendent point beyond being, in modernity observation itself is observed as what allows all access to "being," and therefore it is reality that is pushed to "nothingness" (see Rasch, 2012, p. 93). Being is subordinate to observation, and hence must renounce any "enforceable" claim to autonomy. What can be known of reality is always a system-centered construction.

Luhmann even seems to argue that nothing restricts the self-perpetuation of extant, positive, contingent social orders, because all limitations become fuel for system's self-transformation and evolution:

[39] "Sie [Reflexion] kann und muss sich an nichts mehr jenseits ihrer selbst halten, sie wird in *diesem* Sinn nihilistisch."

> If one starts from the assumption [...] — as constructivism does — that this [observation] is always a real process in a real environment, which is always subject to limitations coming from the environment, what might then be the problem?
>
> The problem could reside in the question of how a system is able to transform such *limitations* into *conditions for increasing its own complexity*. The *non-arbitrariness* of knowledge would then be nothing other then [sic] the evolutionarily-controlled *selectivity* of this process of change. (Luhmann, 1990b, p. 77, original emphasis.)

Constructivist knowledge is not, Luhmann argues, arbitrary, because knowledge is produced in response to limitations that the unknown reality sets for the system's constructions. Contrary to his explicit claim that ontology is obsolete, this claim clearly has implicit ontological implications: it presupposes that there is a reality *of* which knowledge is possible, and that cognitive constructivism is not all there is. However, if the resistance of reality can only count as an irritation for the system's own evolution, what independent meaning can it have? System evolution would not be possible without the unknowable reality that becomes system-internally constructed as an environment with the help of system-internal distinctions. Irritations may nudge the system to the auto-immune relation to itself, to controlled instability and self-transformation, but it is unclear whether the resistance of reality has any other value or significance than pushing the system to change its current state. As Stegmaier explains, "[t]he construction constructs out of the unknown, uncertain, ungrounded, nihilistic nothing. The nihilistic nothing becomes the constructivist nothing. It is not unreal, but that what then counts as 'the reality'" for the system" (Stegmaier, 2016, pp. 44-45, my translation).[40]

Rasch argues that, despite his explicit rejection of all ontology, Luhmann's constructivist epistemological position implies that:

> the empirical reality of which knowledge is produced *requires* a concept of ontological reality *in order to see itself as empirical*. That is, empirical reality can only recognize itself as empirical reality — as the domain of science or the domain of Luhmannian constructivism — if it contrasts itself to a necessarily "real" reality, a reality that acts at the very least as a logical condition of possibility. [...] To protect constructivism from the charge of idealism [and mere nihilism; HL], the distinction between ontological reality (which may very well remain both unknown and unknowable) and empirical reality is contained, ambiguously and almost as if by accident, in Luhmann's loose use of the word "reality." (Rasch, 2012, p. 98, original emphasis.)

[40] "Die Konstruktion konstruiert aus dem Unbekannten, Ungewissen, Haltlosen, dem nihilistischen Nichts. Aus dem nihilistischen Nichts wird ein konstruktivistisches Nichts. Es ist nicht irreal, sonder das, aus dem das konstruiert wird, was dann als 'die Realität' gilt."

In a sense, reality is split within itself into a self-perpetuating system/environment unit and reality of which nothing can be said except that it is only accessible through system-internal distinctions and that, as each distinction can be seen to be contingent and giving rise to finite observation, the reality that can be observed with their help can indirectly be marked *as irreducible* to any such observation-enabling distinction. Luhmann's claim that ontology (the significance of "real" reality) has become obsolete in modernity is hasty, as it makes his constructive epistemology somewhat unable to draw a plausible distinction between nihilistic idealism and his implied minimal realism. Although the reality can only be accessed via the mediation of systems – it can only be accessed *as* something presented by a system – such constructions are constructions *of* something incongruent to them.

To see the relevance of this for our purposes, let us consider an example: the decolonization of the Global South. As has been argued by critical international lawyers, for example by Sundhya Pahuja, for the Global South even to begin to resist colonialism and address the economic and political wrongs that it had endured, it was a practical necessity to formulate this fight in terms of international law (see, e.g., Pahuja, 2011). That is, the Global South had to formulate its resistance within the very same system that in many ways had contributed to their oppression and that had been formed by the history of colonialism and the political and economic values of the North. While international law certainly was able to transform itself and include decolonized states as new, independent states, this transformability has been shown to be seriously limited and the victories of the Global South have remained ambiguous. Pahuja argues that the newly gained independence required of these states conformity to a certain form of socio-political organization defined by a specific set of Western values and ideals (Pahuja, 2011). The newly decolonized, sovereign states of the Global South were cast as "developing states," and thus put onto a progressive scale at the top of which was the ideal image of the Northern capitalist, anti-communist democratic state. The exercise of state sovereignty was, by implication, constrained by this image of the "normal" or "developed" state that was also enforced by the economic international law. The transformation of international law and its inclusion of new, decolonized states as "equals" has, thus, by no means meant a genuine economic autonomy, but, rather, legally enforced conformity to a certain economic model legitimized in terms of "development." The claims to justice of the Global South, Pahuja argues, were "divert[ed] […] toward a highly specific economic programme for development, delimiting the open-endedness of the possible meanings of justice and curtailing the political potential in international law" (Pahuja, 2011, p. 49). The claims to justice presented in the Global South were not reducible to the way in which they were received in the transformed international legal and political system to which they were addressed. It is crucial for critical legal theory to emphasize this difference between claims to justice and their institutional reception and the ambiguity of legal transformation: the way in which the legal system answers to such claims may mean the growth of its internal complexity, but it may also mean misrecognizing the claim, answering to it in a way that leaves the claim unaswered.

Insofar as Luhmann's epistemological constructivism emphasizes the functional continuity of the system vis-à-vis the irritations of the reality it encounters, it is unable to theoretically address the significance of this ambiguity and, for this reason, drifts dangerously close to normative nihilism: the dynamic international order is, simply, all there is, the incongruent claim to justice vanishes from view just like the ambiguity of the legal response.

Given that system-independent reality is undecidable, and that the undecidable is, in Luhmannian terms, the other side of a distinction "decidability/undecidability," Luhmann decides for decidability, that is, he prefers system-internal decidability and knowledge over the "reality that remains unknown." Critical legal theory seeks, in contrast, to bring this distinction itself into focus. Law presents justice *as* this or that kind *of* justice. Although we cannot access any justice "in itself" or "as such" beyond our representations of it – we cannot, in our post-Cantorian age go back to the onto-theological view – such particular constructions of justice must in some way acknowledge their particularity and that they are not identical to justice as such, if they are to distinguish themselves from mere nihilism and arbitrary subjectivism and idealism. They must in some way come to see that although they cannot see that they cannot see what they cannot see, their vision of the world is not identical to the world.

So, on the one hand, Luhmann's constructivism makes explicit that positive orders of knowledge are limited and historical, and that no one of them can possibly offer privileged access to reality. There are always alternative descriptions. On the other hand, his constructivism in its emphasis on the functionality and evolution of systems that make all considerations of "reality as such" obsolete bears the danger of becoming an account of mere self-perpetuation of positive systems devoid of purpose other than instrumental, using all "irritations" merely as fuel for self-maintenance. Constructivism can lead to nihilism if the self-maintaining, limited and inconsistent functional system that provides the only means for accessing an intelligible and meaningful reality *itself* becomes absolutized, in the sense that the reality that remains unknown and unknowable simply counts as nothing for it. Pure constructivism undermines the insights that the theory of the ineliminable paradox offers. In legal nihilism, the legal system is left free to consider its constructions of justice as justice *tout court*, with no ambiguity. In order for Luhmann's constructivism not to collapse into a sort of nihilistic idealism in which irritations are fully aligned to the system's immunitary autopoiesis, a stronger notion of the system's ontological, minimally realistic dependency on "the unordered" would be needed. Agamben, Badiou and Lindahl, as we will see later, are all concerned with the status of the presupposed reality beyond systemic boundaries, and all of them seek in different ways to rethink ontology and articulate in a political and normative register the system's relation, or rather non-relation, to what exceeds it. In the following, before turning to Agamben, let me wrap up the discussion on Luhmann's constructivism by looking at its implications for his theory of politics.

4.2.2 The status of political critique in Luhmann's immunological theory of law

We are interested in Luhmann's epistemological constructivism, because the way in which it fails to draw a plausible distinction between epistemological nihilism and minimal realism is arguably also visible in Luhmann's account of the relations between law and politics. As we saw in the example we just discussed, critique, or what can be said to amount to the same: politics, shares the same status as "the reality that remains unknown" in Luhmann's constructivism. It is of utmost importance, I argue, that the theory of paradoxical, contingent systems addresses the threat of normative nihilism, that "justice" neatly falls within the positive legal system and that system transformation absorbs all critique without remainder.

Critical questions are always in principle possible, Luhmann acknowledges, because second-order observation, the observation of other observers as well as self-observation, is always possible, and the paradoxes of observing systems are readily visible from such an outside position. But social systems, like the legal system, also operate on grounds of second-order observation, and they need to constantly formulate an image of themselves as part of their environment and assess how to operate in a novel situation. For this reason, second-order observation is by no means necessarily the same thing as critique (Philippopoulos-Mihalopoulos, 2009, p. 19). Because the omniscient position of the divine observer is no longer possible, critique can only take place as society's self-critique. There is no absolute outside from which critique could be pronounced:

> For the observer is no longer a subject with transcendentally justified special rights in his safe; he is at the mercy of the world that he perceives. He is permitted no self-exemption. He has to place himself on the inner side or the outer side of the form that he uses. He is, says Spencer-Brown, a "mark." For every observation of the world takes place in the world, every observation of society, if carried out as communication, takes place in society. *Social critique is part of the system criticized*; it can be inspired and subsidized, it can be observed and described. And under present-day conditions, it can be quite simply embarrassing if it claims to have the better morality and better insight. (Luhmann, 2013, p. 328, my emphasis.)

Social critique is, as we saw above in the example of anti-colonial resistance, part of the system it criticizes, but it must also be a non-part, and seek ways to remain such, in order not to become fully aligned with the system. As discussed in the previous chapter, Luhmann sees the significance of critique and conflict from the perspective of the continuation of autopoiesis and invisibilization of the paradox. As a sociologist, he prefers unwaveringly to observe the autopoiesis of systems to detailing possibilities for critique to inflict inoperativity on systems. Critique and conflict function as irritations that may lead to a response from the irritated system, but Luhmann is not very interested in thinking about the significance of the ambiguity in legal

transformation that we just explored. For Luhmann, the role of critique and conflict is to be understood within the immunological theory of society (Luhmann, 1995a, p. 371): law maintains normative expectations in society and in this way manages the risk of conflict for the society (its immune defense, the maintenance of social order), but also allows for controlled modification of these expectations in response to critique (auto-immunity) in order to maintain its societal function. We could describe this as a dynamic or resilient form of conservatism. Let us return briefly to this notion of immunity, as it is a notion that has also emerged as central in contemporary political theory of (biopolitical) nihilism and law's role in it, and it will also allow us to connect Luhmann's theory to Agamben's.

As mentioned above, the legal system uses conflicts to reproduce itself, to learn and augment its internal complexity, in order to keep itself relevant for the society. Conflicts that always concern different issues thus allow the legal system to keep itself updated and prepared for new threats. "[T]he formulation of rules is like the generation of antibodies for specific cases" Luhmann stresses. "If no demands are made on the immune system of society, it cannot learn and consequently cannot generate disturbance-related defense mechanisms" (Luhmann, 2004, p. 477).

The occurrence of critique and conflict makes manifest that the system to which the critique is addressed is not adapted to its environment. By developing an immune mechanism, the system can maintain its differentiated functional and structural autonomy and sensibility instead of adapting itself to the environment (point-to-point correspondence with environmental stimuli). The function of the immune system is to register internal conflicts, solve and memorize them so that the memory can then be used to fight future conflicts. Given that environmental irritations always change, the immune system must learn from novelty in order to maintain itself as efficacious. This leads to internal modulations in the system and to an adjusted, varied sensitivity and capacity to respond to irritations in the future.

Reparadoxification of law as a form of legal critique, the explicit formulation of inconsistencies inherent in the legal system, is, from this perspective, an aspect of law's own immune defense. The paradox and contradiction are "the other" to knowledge, just like the reality that remains unknown, but their unknowability does not prevent the system from taking a stance toward them. Luhmann writes:

> Like pain, contradiction seems to force, or at least to suggest, a reaction to itself. To connect with (react to) a contradiction, one need not know what contradicts the usual expectations, or try to discover what a contradiction is, or even value what is contradictory in its own right. *Contradiction permits reaction without cognition*. All one needs is the characterization brought about by the fact that something takes on the semantic figure of a contradiction. This is why one can invoke an immune system and coordinate the theory of contradictions with an immunology. Immune systems also operate without cognition, knowledge of the environment, or analysis of disturbing factors; they merely discriminate things as not belonging. (Luhmann, 1995a, p. 371, my emphasis.)

The irritated system does not need to know anything about the reflexivity, singularity of the system irritating it; it only responds to its own construction of an outside irritation. Remember here the retroactive construction of informative communication: it is not that an informational content (for example, how a case of domestic violence is experienced by those involved in it) is directly transferred, as such, to law, but rather that the legal system interprets independently the meaning of a conflict that irritates a reaction out of it.

As Roberto Esposito has noted, the etymological roots of the notion of "immunity" go back to the Latin noun *immunitas* and its corresponding adjective *immunis*, which are negative terms the meaning of which derive from what they negate, namely, the *munus*, meaning a task, obligation or duty. *Immunitas,* then, means being released from an obligation toward somebody, being exempted from the reciprocal relations between the right-holders and obligation-bearers (Esposito, 2011, p. 5; see also Esposito, 2011, pp. 45-51). Analogically, within the immunitary paradigm of law, there are no reciprocal relations between law and the non-law; the only place for reciprocity is *within* the law. It cannot be stressed enough that, for Luhmann, systems do not communicate directly with their environment, they communicate within themselves about the constructions they form about their environment. Because the legal system is immune to, *released from direct relations with*, reality, it can maintain its autonomous perspective and give legal responses to what irritates it. The immune mechanism has a "life-protecting" and life-prolonging function for the system, just like it does for a living organism. It is the system's security mechanism that monitors, entrenches and, if need be for the goal of survival, modifies the distinctions with which it operates. A high degree of indifference is the precondition for something to make a difference for law, as well as for law to make a difference to society. However, the distinction between what makes a difference for the system and to what it remains indifferent is not hypostasized, but dynamic, transformable if the system so decides. By protecting itself (which may mean modification of its extant expectations, as we noted above), the legal system protects its functionally-specific place in modern society. Immunity also holds the system at arm's length from what challenges it: it operates by hearing only such claims that it is prepared, or can prepare itself, to hear.

This ambiguity of the immune system of law can be further illustrated by the recent theorization of migration as "autonomous." According to the notion of "autonomy of migration," migration does not simply obey such "objective" structural causes as poverty or wage differentials, but is, significantly, driven by "the subjective desires and projects migrants pursue with their migrations" (Scheel, 2013, p. 579). Autonomy of migration scholars argue that:

> the subjective movement of living labour constitutes a driving force in the evolution of capital accumulation. [...] contemporary migrations are structurally in *excess* of the equilibriums of (national) labour markets and codified forms of citizenship that practices of rebordering try to maintain,

> thereby forcing these (and other) institutions into a process of permanent reorganisation and adaptation. (Scheel, 2013, pp. 579-580)

Migratory movements are always one step ahead of practices of containing them, thereby constantly irritating the system of migration governance to keep up, to find and control the new migration routes that human beings irreducible to the system's attempts at behavior regulation always find, subverting extant forms of border control. Here, conflict, in the sense of migratory movements always finding the cracks in the edifice of border control, clearly is a source of stress for the system to keep on maintaining itself "adequately complex" and functionally optimal.

Autonomy of migration scholars are inspired by the tradition of autonomist Marxism that "regard[s] the social and political struggles of the working class as the 'motor of history'" (Scheel, 2013, p. 581). Stephan Scheel argues that "[t]he autonomy of migration is seen as 'a *constituent* force' that articulates various political and social struggles of the neoliberal era" (Scheel, 2013, p. 579) and even that the "proponents [of the autonomy of migration] conceptualize borders not as the impenetrable walls of an imagined fortress, but as dynamic sites of contestation and negotiation, where migrants' practices and tactics encounter the strategies and devices of control, entering a '*relationship of reciprocal determination*'" (Scheel, 2013, p. 579, 582, citing Bojadžijev & Karakayali, 2007, p. 204; original emphasis omitted, emphasis mine).

However, such entering of migrants' protests at the borders into a *reciprocal* relation of influence with the control system seems unlikely, precisely because social systems function with the immunitary logic that releases them from any reciprocity with conflict systems outside them. While I agree with the autonomy of migration scholars that state borders, and the boundaries and limits drawn by legal orders in general, certainly are not politically neutral and the so-called "irregular migration" can be seen to "politicize" them, it cannot exercise any *direct* influence or "constituent force" on the systems defending and re-drawing their own boundaries and limits.[41] Immunitary logic poses a serious challenge for political theory to articulate a notion of politics that 1. takes into consideration the asymmetry between the system and what challenges it and 2. refuses to accept that systemic responses to irritations simply make invisible the gap between the political claim to justice and legal justice. We can neither plausibly argue for migrant protests directly constituting migratory regimes once we accept Luhmann's convincing view of the systemic closure, nor can we remain with Luhmann insofar as his position is overtly functionalist and merely constructivist.

For Luhmann, in situations in which the legal system becomes dogmatic and shows signs of becoming irrelevant, reparadoxification can serve to irritate the system to create novel internal complexity more adequate to society in its current complexity.

[41] Stephan Scheel, in fact, himself notes that, for example, the Visa Information System that contains biometric data on migrants such as fingerprints, constitutes migrants' "traceability" and their "data double" that allow the security officials to turn the acquired knowledge of migrants' past movements into the control of their movements in the future, "thereby forstall[ing] previously successful mobility strategies," such as apprehended migrants' practice of hiding their identity (Scheel, 2013, p. 596). The system does learn from the migrants' "constituent force," but in a way that exclusively benefits its own internal, functional rationality.

The system will reject inconsistency because it must prefer consistency, and, in the process, it succeeds in updating itself. To immunize is, for Luhmann, to deparadoxify (see Richter, 2018, p. 231). "Social systems [...] need contradictions for their immune systems, for the continuation of their self-reproduction under difficult circumstances" (Luhmann, 1995a, p. 386). According to Luhmann:

> One can clearly see how contradictions fulfill their function of warning and alarming. *For an instant they destroy the system's total pretension to being ordered, reduced complexity*. For an instant, then, indeterminate complexity is restored, and everything is possible. *But at the same time contradictions possess enough form to guarantee the connectivity of communicative processing via meaning*. The system's reproduction is merely directed into different paths. (Luhmann, 1995a, p. 373, original emphasis.)

If the rule explodes, like in Wittgenstein's paradox, and cannot momentarily find its correct application and following, "everything becomes possible" instead. This moment of inoperativity feeds the autopoiesis of the system. It does so by offering it an occasion to reconsider itself, re-indicate its relevant past and re-formulate the program for the correct application of the norm in a way that seeks to respond to the environmental disturbance and, above all, keep the autopoiesis operating.

Luhmann's functional-evolutionary view of law and the necessity of dealing with the paradox for the sake of the stability of the function – maintenance of order – poses the question of whether this is not an entirely reductive view of law's relations to its others and to the problems the contingency of its order poses. What about the ethics and politics of the paradox? As Christodoulidis remarks, for Luhmann:

> [c]onflict is necessary for law because it provides input to the reproductive process without which the system of law would stagnate. But in dealing with conflict, law only achieves a new return to order. It pushes back the threat of disorganisation by conceiving and resettling disturbed practice on the basis of uncontroverted practice (Christodoulidis, 1998, p. 214).

Luhmann only sees in the exposure of the paradox a rather mythical threat to the operability of the system, something that is observed to be always already suppressed by the normally operating system, or it is the internal irritation that forces a reaction from the system that returns it to an adjusted order. Its exposure and reparadoxification do not count, for Luhmann, as achievements of a *political conflict over forms of commonness*, but rather as an evolutionary occurrence (although they can use political semantics, such as the semantics of revolution, see Luhmann, 1996). The paradox is there necessarily, and the system needs to constantly react to its ineffability, but Luhmann does not understand the play between de- and reparadoxification in law as a site of *political disagreement* over the legal form of collective life.

The problem for any critical legal thinking, Christodoulidis argues, is law's institutional inertia and its current coupling with the demands of the global capital. The legal system controls its own reflexivity and, therefore, also the possibilities of legal change, and given that it is coupled with the economic system, also the opportunities for political change that challenge legally entrenched structures of global capitalism:

> [T]he effort to generalise legal strategies of [political] rupture comes up against the limits of the "institutional": institutions reduce the contingency of human interaction, they entrench models of social relationships and, in that, hedge in imaginative political uses and opportunities. In all this they afford a limited language to challenge entrenchment and, with it, remove the purchase point for "rupture." (Christodoulidis, 2008, p. 10)

"Mechanisms of deliberate deadlock" are one version of institutional inertia that Christodoulidis identifies. These include "the 'rigidity' of Constitutions, the formality of constitutional amendment procedures, the exclusion from amendment by any majority of, typically, basic rights and safeguards of property" and "a progressive dismantling of labour protections as an unavoidable effect of the *global* organisation of trade that circumvents any possible *municipal* safeguards." These are empirical-institutional mechanisms that hedge in constitutional discussions and political conflicts over the effects of global capitalism in such a way as to effectively block its victims' opportunities for redress (Christodoulidis, 2008, pp. 10-14, original emphasis).

Another form of institutional inertia is law's "homology." This is about "repetition and entrenchment, coherence and stability of expectations, and it finds expression, amongst other things, in the characteristically conditional form of law's programming" (Christodoulidis, 2008, p. 10). If x happens, y ought to follow, is how law anticipates future conflicts, and if the future disappoints its expectations, the legal system will need to resort to "controlled innovation." It will itself control what "surprises" it, "what registers as information that might lead it to vary expectations" (Christodoulidis, 2008, p. 11). The degree of radicality of legal change is reduced by the function of the legal system to maintain normative expectations and "the exigencies of the rule of law" in society (Christodoulidis, 2008, p. 11). It is simply not possible for law to allow radical rupture, because that goes against its societal function and society's expectation that normative expectations be upheld in cases of their disappointment. Luhmann, Christodoulidis reminds us:

> argues that if law is to reduce complexity successfully it must be able to handle multiplicity operatively, and to handle multiplicity operatively plurality must be related to a unity and symbolised by it. This coupling of open multiplicity to the unity of the legal system does not of course do away with "excess." But it orients it *functionally* to the legal system. (Christodoulidis, 2008, p. 20)

Everything that is new, must be capable of linking back to what is already institutionally established, so the need for redundancy seriously limits what novelty there can be in law and legal language; too radical a novelty will simply not be recognized as a legal communication at all, and thus lacks the "linkage capacity" necessary for the operation of communication. "Chance," Christodoulidis writes, "becomes the condition of variation — (from a functional point of view, therefore, not an 'excess' at all!) — and thus the condition of the evolution of the system. Nothing less than the system's own reproduction is at stake" (Christodoulidis, 2008, p. 20).

Furthermore, for Luhmann, the reflexivity of the legal system is not to be understood in the political terms of "collectivity" and "commonality" at all. According to him, it is the *political subsystem* of society whose function it is to produce "collectively binding decisions," although it does so in the medium of law (Luhmann, 2002a, p. 87). Luhmann locates politics fully within the autonomous political system, that is, within institutional politics. During the evolution of the functionally differentiated modern society, political power has been concentrated into that system, making other social subsystems accordingly "unburdened" by politics, de-politicized. The political system functions on grounds of the code governing/governed, which provides the distinction between those who have power and those over whom power is wielded, and further within the side "governing," with the code government/opposition (Luhmann, 2002a, p. 86; King & Thornhill, 2003, p. 71). The implication, then, that:

> Luhmann's analysis leads us to is that the political intelligence of democracy — its sensitivity — is determined by and circumscribed by what the code "government/opposition" can make visible. Only what affects and modifies the prospects of the government or opposition acquires political relevance. What can be politically observed is opened up and at the same time delimited by the conditioning difference. (Christodoulidis, 1998, p. 250)

Political conflict over the "common" form of life registers in the political system and offers the occasion for that system to modify itself and keep itself relevant. The field of the political is, thus, circumscribed to what that system can absorb.

Here Luhmann does not consider the possibility of the theoretical figure of "the double inscription of the political" (see Stäheli, 2000, pp. 261-266): "The 'political dimension' is," Slavoj Žižek writes, "[...] *doubly inscribed*: it is a moment of the social Whole, one among its subsystems, *and* the very terrain in which the fate of the Whole is decided" (Žižek, 1991, p. 193). That is to say, "politics" might be understood in a double sense as the operation of the political system, as institutional politics and what registers within institutional politics, and as the making of decisions in conditions of undecidability in general. The political is the event of the critical exposure of the ungroundedness, contingency and paradoxicality of a system-grounding distinction that no invisibilization on the part of the system can fully absorb; a critique that insists on the system's inability to fully "justify" its decisions and reductions, an event that

can be generalized to all systems claiming to order reality in an exclusionary and reductive way.

Although Luhmann knows that "communication means limitation (placing oneself and the other within limits)" (Luhmann, 1995a, p. 40), that it is based on preference among alternatives that cannot be justified in any other way than that which the preference itself makes possible, he does not thematize such limitation and drawing distinctions — such reduction of pragmatic, behavioral and communicative possibilities — *as itself a political act*. He does not think that emergence of forms and totalities would have anything political to them (apart from the emergence of the specific system of politics of course). From the perspective of the double inscription of the political, by contrast, "the very genesis of society is always 'political': positively existing social system is nothing but a form in which the negativity of a radically contingent Decision assumes positive, determinate existence" (Zizek, 1991, p. 194).

Hanna Richter has, however, recently argued that "Luhmann explores how the immunisation of modern politics which epistemologically governs the demarcation between inside and outside, complexity and its resolution in meaning, *necessarily* opens up a space of *political* potentiality" (Richter, 2018, p. 233, partly my emphasis; see also Christodoulidis, 1998; Philippopoulos-Mihalopoulos, 2009; Stäheli, 2000 and the essays in Amstutz & Fischer-Lescano, 2013 for re-appraisals of the possibilities of critique in Luhmann). Luhmann's account of critique might be, and has been, pushed toward understanding legal critique as *immanent* critique as developed in the tradition of the leftist critical theory, as critique that uses the internal contradictions of the legal system to compel it to transcend and transform its present state, rather than simply repeat the *status quo* (see Christodoulidis 1998, 2008). However, although Luhmann's work certainly offers material for such use, he himself seems to consistently prefer autopoiesis over inoperativity, functionality over normativity, decidability over undecidability, deparadoxification over the paradox, augmenting of the system's internal complexity to the ambiguity of the legal response, nihilistic constructivism over minimal realism. As a self-identified sociologist, he maybe cannot do otherwise.

Hans-Georg Moeller is correct when he notes, with Luhmann, that "the partial blindness that comes with evolution also implies a certain ethical and pragmatic blindness. Since it is impossible to see everything, it is also impossible to see what is good for all" (Moeller, 2011, p. 71). Normative-political critique is not possible in the traditional universalist sense in which absolute normative criteria could be used to regulate society. The splitting of society into different, autopoietically evolving spheres of rationality makes impossible an objective, totalizing perspective on society and the direction it ought to take. However, this does not mean that social critique would be impossible, or that only a "neutral" observation and description of evolutionary processes would be possible. Critique must register within the particular sphere of social rationality and be able to irritate it and not simply be ignored by it, but it must also present a moment of independence with regard to it, if it is not to simply align itself with it. *And the system must in some indirect way acknowledge critique as such an inclosure paradox, if it is not to collapse into mere nihilistic self-perpetuation in*

which the excess of reality simply counts as nothing. Reality itself is "doubly inscribed."

Politics is what keeps the paradox and the ambiguity of the legal response alive and prevents the functionally oriented legal transformation from naturalizing itself. Luhmann gives a sociological account of functional, societal evolution, somewhat eschewing its resonance as an enduring conflict over social ordering and thereby also the task of rethinking systems' *responsibility* of their own contingency for a post-universalist society. There is a negativity in positive orders that is a matter of politics rather than mere impetus for further normalization.

4.3 Agamben on modern law, biopolitical nihilism and post-juridical politics

As we will see by the end of this dissertation, a survey of different theoretical positions analyzing paradoxical totalities suggests, perhaps unsurprisingly, that what we have named "immunologic" is itself thoroughly ambiguous. It is both a "positive" logic that gives rise to a specific perspective to reality and a particular system of rationality; it is what makes possible, for example, the legal system. Complexity-reduction, selected indifference and drawing of a distinction between what counts as relevant and what irrelevant is necessary for the formation of a positive order of meaning. It is also a precondition for a plurality of centers of meaning to arise, for a plurality of perspectives of reality and for a "freedom" understood as not being taken within a rationality of another social system, being left on one's own, so to speak. Immunity is also a "negative" logic that may push positive orders to nihilistic perpetuation of themselves and their instrumental rationalities. Nihilism, the modern loss of a common reality and substantive values, takes the form of a full degradation of "the real," that is, the loss of signification for law of everything but itself, such that systems recognize nothing as really resisting their operation and thereby become, in a sense, imperialist. Nihilism is the predicament that faces a fully positivized law, law that itself, autonomously, decides what is law and what is not, rejecting all substantive value considerations from the formal and procedural concept of law. In a word, immunologic marks all positive, contingent and *finite* orders that cannot possibly offer a mirroring representation, a neutral and objective bird's-eye-view of reality, but only represent it *as* something, leaving out other possibilities. In Chapter 6, we will discuss Hans Lindahl's theory of law, which seeks to give a full expression to this ambiguity, also teasing out a sort of ethics of finite legal collectives that endeavors to separate them from nihilism. Before going to Lindahl's work, let us in the remainder of this chapter, as well as in the next chapter, discuss two positions that in different ways understand politics as *post-juridical* and *messianic* in a specific sense: those of Giorgio Agamben and Alain Badiou.

I turn first to Agamben's understanding of modern nihilistic law. Agamben has offered perhaps the strongest account of the negative and nihilistic implications of the

immunologic of the legal system as the law's indifference, which abandons human beings to sovereign violence. Agamben's account (in)famously turns around the analysis of the Schmittian sovereign exception (see also 1.2.3). As our discussion of the alignment of political claims to the system's self-perpetuating logic and a certain complicity of critique with the system criticized may already suggest, contemporary political theory has sought to find ways of thinking about radical political transformation that would be able to resist such re-alignment. In this context, the immune paradigm has been discussed in the seemingly archaic, biblical terms of the "*katechon*," "the restrainer." As Esposito puts it:

> [t]he simultaneous presence of development and restraint, opening and closing, positive and negative — typical of the immune paradigm — is represented in exemplary fashion by the enigmatic figure of the *katechon*: whoever its historical or political bearer might be, it still embodies the principle of defense from evil through its preliminary internalization. (Esposito, 2011, p. 11)

We return to the figure of the *katechon* in a moment. Agamben's solution to the legal paradox is, as we will see at the end of this chapter, to think about "messianic" politics, politics as the deactivation of systems functioning with the paradoxical immunologic. Contrary to what I have been suggesting, for Agamben there is little to be saved in the paradoxical law.

4.3.1 The state of exception

"The juridical system of the West," Agamben writes, "appears as a double structure, formed by two heterogeneous yet coordinated elements: one that is normative and juridical in the strict sense (which we can [...] inscribe under the rubric *potestas*) and one that is anomic and metajuridical (which we can call by the name *auctoritas*)" (Agamben, 2005a, pp. 85-86). It is the paradoxical structure of connection and disconnection of these elements, *nomos* and *anomie*, in the law that Agamben studies by focusing on the figure of the state of exception that makes this relation, which is also a non-relation, explicit.

For Schmitt, the thinker *par excellence* of the state of exception on whose work Agamben draws, it is the sovereign (*auctoritas*) that secures the application of law (*potestas*) to facts. The sovereign, as we saw in the *Introduction*, holds the paradoxical position of being both a part of the legal order and outside it. In Schmitt's theory, the danger of "the enemy," chaos, the dissolution of the social order, is negated by the sovereign who has the capacity to step outside the law and suspend it in order to restore the normal state of affairs. The sovereign is neither fully regulated by the law, nor irrelevant to it. Sovereign oscillates between law and life, guaranteeing the possibility for the application and following of the law but maintaining for itself the

power to suspend (not to destroy) the law in order to target society without legal mediation.

The state of exception is "state power's immediate response to the most extreme internal conflicts" (Agamben, 2005a, p. 2). It is the most extreme manifestation of the immune system in which the threat of civil war, insurrection or revolution, that is, the threat of *anomos* and the dissolution of the extant legal-political order, is met with a controlled *anomos*, the suspension of the legal ordered by the sovereign. The state of exception, Agamben argues, is not simply a marginal phenomenon but rather exposes the fundamental structure of Western legal-political order:

> The norm is applied, so to speak, to the exception in dis-applying itself, in withdrawing from it. In this way, the exception is not a mere exclusion, but an *inclusive exclusion*, an *ex-ceptio* in the literal sense of the term: a seizing of the outside. In defining the exception, the law simultaneously creates and defines the space in which juridical-political order is granted value. In this sense, for Schmitt, the state of exception represents the pure and originary form of the enforcement of the law, and it is from this point only that the law may define the normal sphere of its application. (Agamben, 2005b, p. 105, original emphasis.)

Now, this quite closely follows the immunologic as we have been discussing it with Luhmann. In drawing the limit between itself and non-law, in withdrawing from something and exempting something from its regulation, the legal system opens the space of the application of its code. In order to be able to include something within its scope, law needs also to exclude, and not simply something else but also alternative interpretations of the "same thing." Law excludes the *anomie*, the non-law (*a-nomos*), but also exclusion is a mode of relation. Agamben calls it in the quote above *inclusive exclusion*: including something only in the mode of withdrawing from it and excluding it. An *ex-ceptio* is captured, "re-entered" outside: reality that is excluded in the very inclusion of it as the law's own environment. *Nomos* is dependent on the anomie it nevertheless excludes. Furthermore, the sovereign immunologic is autoimmune: in the exceptional case, it defends the legal order by suspending that order.

In Agamben's analysis, the basic structure of inclusive exclusion has profound implications for the operation of the Western law and politics. In the state of exception, in which the sovereign's legally unmediated power (that is, power immune *to* law and law's autoimmunity) comes to light, law's necessary selective indifference also comes to light. It is the exposure of the law's dependency on anomie that the legal system in normal conditions succeeds in making invisible and at least relatively unproblematic. In the actual state of exception in which the sovereign suspends the application of the law to a conflict at hand to the benefit of its political, or executive, solution, the limited perspective to reality that the legal order provides is exposed as such. The legal order itself becomes thematic as a totality, as a specific, limited totality of norms. Its relation to reality is thematized as well, in contrast to the normal situation in which the relation is simply presupposed. Agamben argues, following Schmitt, that it is precisely this

relation to reality, to fact and life, that the law as a system of norms can never itself guarantee. In the state of exception, it becomes evident, Agamben argues, that law needs the exception, the sovereign anomic authority, in order to secure this relation: "[T]he state of exception separates the norm from its application in order to make its application possible. It introduces a zone of anomie into the law in order to make the effective regulation [*normazione*] of the real possible" (Agamben, 2005a, p. 36).

As we saw in the Introduction, the state of exception corresponds structurally to Wittgenstein's paradox of rule-application as it is precisely the moment in which the inability of the rule to autonomously secure its own relation to the real is exposed. It is the moment in which the reality that remains unknown for law (in any other way than as a legal reality) pierces law's closure and shows the dependency, despite all attempts of the legal system to render this dependency invisible, of the "autonomous" legal system on the anomic political decision or the "effective operation" (Agamben, 2005a, p. 40) that no structure or form of law is able to fully determine. The decision is not, Agamben specifies, "the expression of the will of a subject hierarchically superior to others," but it is, rather, about "the inscription within the body of the *nomos* of the exteriority that animates it and gives it meaning" (Agamben, 1998, p. 26).

4.3.2 Juridical fiction, the force-of-~~law~~ and language

The state of exception can also be seen as the inverse image of Kelsen's basic norm that functions as the legal fiction, as the juridical scheme of interpretation, through which the political, revolutionary act of constitution-making can be interpreted as a legally empowered act undertaken within a legal system.[42] Just like in our discussion with Kelsen of the basic norm as the final point of regress of the validation of legal norms, we encounter here the limit of a legal order: the measures taken in the state of exception are "in the paradoxical position of being juridical measures that cannot be understood in legal terms" (Agamben, 2005a, p. 1). The state of exception has the structure of the inclosure paradox: a point in which law slips outside itself without fully severing a relation to its inside. It is "the legal form of what cannot have legal form" (Agamben, 2005a, p. 1). Agamben criticizes the tradition of legal theory for not recognizing the impossibility of establishing a simple topographical opposition inside law/outside law with regard to the state of exception, and of endlessly debating whether the law is capable of regulating it or whether it is a purely political act (Agamben, 2005a, pp. 22-23). For in question is rather "a zone of indifference, where inside and outside do not exclude each other but rather blur with each other" (Agamben, 2005a, p. 23).[43]

[42] Dyzenhaus (1997) and, in particular, Vinx (2015) have studied extensively the debate between Kelsen and Schmitt.

[43] *Insofar as* the dogma of the law's necessity to render invisible all inconsistencies guides Luhmannian legal scholarship, systems theoretical sociology does not seem able to fully appreciate this Agambenian zone of indistinction characteristic of not only the state of exception but also the right to

The sovereign, Schmitt maintains, is the one who bears the power of suspending the basic norm, that is, temporarily to release the state power from its obligation to obey the constitutional norms that regulate the use of power. It is the power to act *as if not* bound by the legal order. If the legal system is the society's immune system, as Luhmann argues, which helps society to deal with risks by formulating expectations of how things ought to unfold and preparing for the disappointment of these expectations, then, in the state of exception, the political sovereign suspends this immune system for the sake of its continued possibility. In other words, what the immune system protects against — *anomie*, loss of order — is itself used to protect the *nomos*. The sovereign is, for Schmitt, *der Hüter der Verfassung*, the guardian of the constitution (Schmitt, 1996). Insofar as the state of exception is recognized as a legal possibility and explicitly regulated by the legal order (as to its temporal duration and the obligation to declare it with a law, for instance), the law (or legal cognition, as Kelsen would maybe say) constructs a *fictio iuris* of its own temporary suspension. The state of exception then is a legal fiction, a legal *as if*, of a political act performed *as if not* bound by the law.[44] This legal fiction of the sovereign exception as the guardian of the constitution is important, or so Agamben argues, for it allows Schmitt to maintain a relation between politics and law in the mode of its suspension, and to emphasize that, as a feature of the immune mechanism, a state of exception is *not* about abolishing the law, but only an extreme technique for its protection. I return to this point and the importance of fiction below.

For Kelsen, the problem was to show how political acts of constitution-making can be seen as legal and possessing the force of law. For Agamben, the problem is that within an established constitutional order, decrees of executive power that do not constitute law according to the principle of the distribution of powers come to possess the force of law. This not only confuses the distribution of powers between the legislative and the executive but actually "separat[es] 'force of law' from the law" (Agamben, 2005a, p. 38). On the one hand, when executive decrees overrule statutes made by the legislator, the established norm cannot apply to the situation and thus is deprived of its force, its legal effect on reality. On the other hand, acts that do not typically count as law now come to have its force. This "force-of-~~law~~" characterizes, in fact, both the state of exception that suspends the constitution as well as the revolution that establishes a new constitution (Agamben, 2005a, p. 38). In both cases, an act that cannot be legally empowered in the usual manner claims to act with the force of law. Agamben's strange notion of "force-of-~~law~~" thus points to what we have been analyzing in the terms of the paradoxical retroactive temporality.

Furthermore, Agamben argues that there is a structural analogy between law and language. In the same way as words are not reducible to their uses in actual speech

resistance (see Agamben, 2005a, pp. 10-11, for the right to resistance; Nobles & Schiff, 2013 for a systems theoretical discussion of the inability of law to recognize such a right).

[44] Agamben discusses the "as not" in relation to juridical fictions and Vaihinger's philosophy of the *als ob* in *The Time that Remains*, noting that much more is at stake in fiction than Vaihinger (or, we could add, Kelsen) is aware of (Agamben, 2005b, p. 28, 35-37). McLoughlin, too, notes the connection of the notion of fiction to Kelsen in his discussion of Agamben (McLoughlin, 2016, pp. 523-524).

acts, also rules do not coincide (and ought not coincide insofar as they ought to be general) with the singular cases to which they apply. Both maintain their meaningfulness beyond any particular act of use and application. As we have noted, the iterability of a rule, its repetition in an indefinite number of cases, is what a rule is about. On grounds of this irreducibility of language and law to their concrete use, Agamben argues that they both presuppose a state of exception, namely *the "virtual" existence of law and language in a state of non-application* (Agamben, 2005a, pp. 36-37; Agamben, 1998, pp. 20-21).

A word can in an actual occurrence of speech refer to and denote a segment of non-linguistic reality "only insofar as it is meaningful in its own not-denoting (that is, as *langue* as opposed to *parole* [...]), so [in an analogous way,] the rule can refer to the individual case only because it is in force, in the sovereign exception, as pure potentiality in the suspension of every actual reference" (Agamben, 1998, p. 20). Language can be analyzed as grammar or *langue*, that is, as the abstract system, as "the pure potentiality to signify" of language (Agamben, 1998, 21), and as *parole*, that is, as the concrete, actual speech act in which the potentiality to signify non-linguistic reality is actualized. So it is also for law: it can be seen both as an abstract system of norms, as the *pure potentiality to regulate*, and as the actual application of norms to concrete situations in which this potentiality is actualized.

Both language and law presuppose a reality external to them to which they potentially refer, that is, to which they are both able actually to refer (in *parole*, in judgment) and *able not to* actually refer (as *langue*, as a system of norms). The exception is the situation in which the actualization of this potentiality to refer is suspended. Thematizing language as the linguistic system allows for observing it as pure *langue*, as "the linguistic 'state of exception'" (Agamben, 1998, p. 25), and therefore also observing the general potentiality of language to relate to the non-linguistic (actualized in cases of *parole*) in a state of pure potentiality or, as Agamben puts it, *impotentiality*. As this thematization of language and its relation to the non-linguistic itself also happens in language (and thus no neutral metalanguage is available), we can then say both that "there is nothing outside language" and that "language is always beyond itself," as it denotes the non-linguistic (Agamben, 1998, p. 21). We can see how "language excludes and separates from itself the non-linguistic, and in the same gesture, it includes and captures it as that with which it is always already in relation" (Agamben, 2016, p. 264). Similarly, "force of ~~law~~," Agamben writes, "in which potentiality and act are radically separated, is certainly something like a mystical element, or rather a *fictio*, in which law seeks to annex anomie itself" (Agamben, 2005a, p. 39).

While in the normal operation of the legal system the regulative relation of legal norms to facts is unproblematic and taken, just like in normal and everyday speech, to simply refer to a non-legal reality, the state of exception thematizes the very form of law and makes the asymmetry that we discussed with Luhmann between law and reality visible. The legal exception makes thematic in law its own form as a system of norms that, in general and in the normal case, relate to an outside, to non-law (life, fact). Its own limit with the non-law, or the zone of indistinction, is thematized. In

analogy to the thematization of the *langue*, "the paradox can also be formulated this way: 'the law is outside itself,' or: 'I, the sovereign, who am outside the law, declare that there is nothing outside the law [*che non c'e unfuori legge*]'" (Agamben, 1998, p. 15). Law's closure presupposes its inconsistency, which splits the law within itself, bringing an anomic element to its heart. The state of exception has such a fundamental significance for Agamben, because it makes this condition explicit, purging it from attempts to render the inconsistency invisible. The thematization of the zone of indistinction that normally is simply presupposed creates a "cognitive confusion" about what belongs inside and what outside, making it difficult to say what, if anything, is strictly speaking outside the law, and what, if anything, is strictly speaking inside the law.

4.3.3 Impotentiality

The exception, thus, actualizes the potentiality of the law *not to be* applied to reality. Agamben famously reads the Western notion of sovereignty back to Aristotle's theory of potentiality and actuality, in particular to Aristotle's insight that in order for a potentiality to do or be something (like the ability of the architect to design) not to always immediately disappear when it is actualized, a true potentiality must also be able *not to* pass over into actuality. For example, the architect must be able to maintain his ability to design buildings even when he is not designing. Every potentiality is a potentiality to do or be something, but also to an equal measure a potentiality not to do or be that something, an impotentiality. Actualizing a potentiality is thus not about destroying or consummating it, but rather about suspending the impotentiality inherent in it. For Agamben, the thinking of contingency turns around the notion of potentiality (Agamben, 1998, pp. 45-46).

What the figure of the sovereign and the state of exception in the Western political tradition stands for is, according to Agamben, a certain *colonization* of the "universality" of potentiality, a colonization of what most defines human beings: their lack of necessary tasks and vocations. Human beings, ontologically speaking, do not have essential tasks to accomplish, but they are "without work" (see Agamben, 2016, pp. 3-5), beings that are defined by potentiality to be or do something that is not a necessary task and therefore something they also *can not* be or do. For Agamben, no human essence restricts how human beings can shape and form their life:

> Beings that exist in the mode of potentiality *are capable of their own impotentiality*; and only in this way do they become potential. They *can be* because they are in relation to their own non-Being. [...] [H]uman beings, insofar as they know and produce, are those beings who, more than any other, exist in the mode of potentiality. Every human power is *adynamia*, impotentiality; every human potentiality is in relation to its own privation. This is the origin (and the abyss) of human power, which is so violent and limitless

> in relation to other living beings. *Other living beings are capable only of their specific potentiality: they can only do this or that. But human beings are the animals that are capable of their own impotentiality. The greatness of human potentiality is measured by the abyss of human impotentiality*. Here it is possible to see how the root of freedom is to be found in the abyss of potentiality. To be free is not simply to have the power to do this or that thing, nor is it simply to have the power to refuse to do this or that thing. To be free is, in the sense we have seen, *to be capable of one's own impotentiality*, to be in relation to one's own impotentiality. This is why freedom is freedom for both good and evil. (Agamben, 1999, p. 182, original emphasis.)

For Agamben, human life is characterized by "its radical openness and indeterminacy, the separation from one's immediate environment [...] and absence of specialisation" (Prozorov, 2014, p. 36). Orienting oneself in the world is not about "executing tasks" through which social systems observe and legal orders regulate this orientation. Human life has no necessary ends that must be executed, but each human power is an impotentiality. The problem, for Agamben, is that the governmental apparatus operates on the grounds of a certain separation of human beings from their impotentiality that makes of the state of exception its only manifestation. Leaving aside the question of whether Agamben is correct in his claim that the behavior of non-human animals can be explained by their genetic code,[45] what he calls *biopolitics* is, for him, a certain animalization of human life. Biopolitics determines this life as a specific kind of life, gives this life particular ends, separates it from its potentiality not to be so determined and confines it to the actualization of the ends it sets. The only form in which impotentiality appears in the contemporary world is, in Agamben's diagnosis, the paradoxical apparatus of anomic, suspended law that clears the space for the sovereign dominance of life beyond legal protection. Anomic law colonizes impotentiality with the help of juridical fictions, ultimately with the fiction of the force-of-~~law~~ and the sovereign exception as the guardian of the constitution that seeks to legitimate the sovereign claim to protect life by submitting it to anomic violence. Under biopolitical nihilism, human life cannot manifest its contingency and impotentiality, its irreducibility to and possibility not to be confined to specific social destinies, but is reduced to what Agamben calls "bare life" (Agamben, 1998, p. 4). To restore to human beings their impotentiality is, for Agamben, the task of "coming politics" (Agamben, 1993, p. 86), as we will see below.

[45] Elsewhere Agamben, however, also gives animal behavior as an example of impotentiality: "[t]he cat who plays with a ball of yarn as if it were a mouse [...] [and thus] knowingly uses the characteristic behaviors of predatory activity [...] in vain. These behaviors are not effaced, but, thanks to the substitution of the yarn for the mouse [...], deactivated and thus opened up to a new, possible use" (Agamben, 2007, p. 85).

4.3.4 Inclusive exclusion in law and language

In the two following subsections, let us now investigate in more detail what Agamben means by the separation of human beings from their impotentiality and how this characterizes the modern anomic legal apparatus. Again, there is, according to Agamben, a strict analogy to how language and its signifying function have been understood in the history of Western thought.

A legal system is, Agamben argues, not simply based on a *Landsnahme*, the taking of the land as it is for Schmitt (note that Schmitt adds the dimension of *space* to law that Luhmann ignores despite his metaphorical use of inside/outside), but rather on an *Ausnahme*, the "taking of the outside," the *ex-ception* (Agamben, 1998, p. 19). Luhmann's "drawing of a distinction" corresponds precisely to Agamben's zone of indistinction between inside and outside that allows the preference of the inside and the asymmetrical relation to the outside: taking in what is outside, forming a legal construction of reality, presupposing a reality that remains legally unknown and unknowable, but to which law still forms the legal relation. "To refer to something, a rule must *both presuppose and yet still establish a relation with* what is outside relation (the nonrelational)," Agamben writes. "The relation of exception thus *simply expresses* the originary formal structure of the juridical relation" (Agamben, 1998, p. 19, my emphasis). This is not very far from what we called above "minimal realism."

For Agamben, what characterizes both law and language is the *inclusive exclusion* of life, reality and what he in a discussion of Plato's philosophy of knowledge calls "the thing itself" (Agamben, 1999, pp. 27-47). An inclusive exclusion establishes a linguistic and legal relation to them, saying something of them or positing an interdiction on them, understanding them only as something of which something can be predicated and as something legal, which simultaneously means that life and reality, "the thing itself," remain excluded. "Human language is necessarily pre-suppositional and thematizing," Agamben argues, "in the sense that in taking place, it *decomposes* the thing itself [...] that is at issue in it and in it alone into a being *about which something is said* and [...] a quality or determination *that is said of it*" (Agamben, 1999, p. 106, partly my emphasis). The thing itself is the something of which something is said and that is known as something rather than something else, but that itself is only presupposed, thus unspeakable in language (and unknowable in knowledge). This inclusive exclusion Agamben also calls the structure of *negative foundation* (Agamben, 2006, p. 61). Something extra-linguistic and extra-legal must be presupposed of which something meaningful and legal can then be said, but that itself remains unspeakable beyond its predicates. "To speak of a being," Agamben argues, "human language supposes and distances what it brings to light, in the very act in which it brings it to light" (Agamben, 1999, pp. 106-107). It both discloses the something *as something*, and distances the something, presupposes that it is already there, before language, so that something can be said *of* it, so that it can be brought to language. Language is a decomposing apparatus for Agamben, an apparatus that presupposes separation for its functioning.

No unmediated, non-linguistic relation to reality is possible that would neutrally transmit what reality, life or the thing itself are "beyond" language and law, but still language, knowledge and law claim to relate to reality, to speak of it, know it and regulate it. "One could say, with an apparent paradox, that the thing itself, while in some way transcending language, is nevertheless possible only in language and by virtue of language: precisely the thing of language" (Agamben, 1999, p. 31). As Sergei Prozorov explains, "the thing itself *only exists within* language even if, for now, it remains unspeakable within it. [I]t is included in language (i.e. it is nothing extra-linguistic) but solely in the mode of its exclusion (i.e. as unspeakable)" (Prozorov, 2014, pp. 61-62, original emphasis omitted, my emphasis).

Although it has been understood in the history of philosophy as a metaphysical postulate of a mind-independent reality that possesses its own inherent structure that knowledge and speech ought to mirror, "the thing itself," just like Luhmann's "reality that remains unknown," is simply the presupposition of language, knowledge and law that *language speaks of something extralinguistic, that knowledge is knowledge of something outside knowledge and that law relates to an extra-legal fact*. "In remaining ineffable, it [the thing itself; HL] thus guarantees that discourse has a meaning, *that it is founded*, and that it speaks about something (that it speaks by means of a *hypokeimenon*, a pre-supposition)" (Agamben, 1999, p. 108). New knowledge is only possible, Luhmann argues, on grounds of previous knowledge, and, as Agamben points out, new linguistic utterances are only possible on grounds that there already is language, but this self-referential closure is nevertheless thought of as an *openness to reality*. Without such openness language and knowledge would collapse into themselves and simply be tautological. Analogically, a legal decision is only possible because there already is law from which to draw, but this self-reference does not prevent, but rather makes possible, that the legal decision is addressed to facts and claims to express *their own* meaning as legal facts.

The thing itself is, thus, not strictly speaking a thing, but rather the very power or intention of signifying, of bringing something to expression, the presupposition that something can be said *of* something. This very power of language to signify and bring something to speech remains unsaid in the communicative operation of language that focuses on the content, on what is said. Unable to put their own power of signifying into expression, every actual speech act nevertheless manifests it. Similarly for law: its power to disclose reality in a particular way is its blind spot, both presupposed and what remains outside legal expression, and yet manifested in each legal decision. As Agamben explains:

> [The] thing itself is not a thing; it is the very sayability, *the very openness at issue in language*, which, in language, *we always presuppose and forget*, because it is at bottom its own oblivion and abandonment. The presuppositional structure of language is the very structure of tradition; we presuppose, pass on and thereby — according to the double sense of the word *traditio — betray the thing itself in language, so that language may speak about something*. The effacement of the thing itself is the sole foundation on

> which it is possible for something like a tradition to be constituted. (Agamben, 1999, p. 35, my emphasis.)

The very openness at issue in language, the always contingent fact of bringing beings to linguistic or legal expression, has been treated, according to Agamben, in the whole Western history as a negative foundation: what is presupposed but remains unsaid and forgotten – made invisible in the very operation of the system it nevertheless makes possible. What has not been expressed in language is the very fact of language, *that there is linguistic signification*.

For Agamben, in exact opposition to Luhmann, all problems *begin* with the forgetfulness and invisibilization of the fact of linguistic signification, of bringing beings to speech (and law). For Agamben, all legal relations and predications presuppose that there is life beyond law to which law can relate itself, just like language is "always presuppositional and objectifying, in that it always supposes that the being about which it speaks is already open and has already taken place" (Agamben, 1999, p. 107). Law considers life uniquely through the lens of its own ends (like maintaining normative expectations), but that lens itself is not brought into visibility within it. To establish a legal relation is to take a living being within the law, to say something of legal relevance of it, but this very speaking of the law, law's relating to an anomic reality, remains its blind spot — that is, at least until the exception thematizes it.

What then, according to Agamben, is specific to modernity is a certain crisis of the presupposition (Agamben, 1999, p. 111) that brings this presupposition of linguistic signification into light as such. As we noted in the discussion on Luhmann's constructivism, in modernity it is no longer possible to imagine representation (the something as something) as mirroring a pregiven being, but the role of observing in observation is itself revealed. The self-reference of observation becomes visible, and the ground of knowledge as observation-independent becomes obsolete and replaced by system/environment distinction. Whereas premodern onto-theological metaphysics mystified the presupposed reality and produced the imagery of God as the absolute, unobserved observer, nihilism is the modern experience of the loss of the mystified presupposition that throws us face to face with observation and, for Agamben, the linguistic signification, and their paradox:

> Thus we finally find ourselves alone with our words; for the first time we are truly alone with language, abandoned without any final foundation. This is the Copernican revolution that the thought of our time inherits from nihilism: we are the first human beings who have become completely conscious of language. *For the first time, what preceding generations called God, Being, spirit, unconscious appear to us as what they are: names for language.* (Agamben, 1999, pp. 45-46, my emphasis.)

Nihilism is the experience of "abandonment of the word by God" (Agamben, 1999, p. 46), the exhaustion of the presupposition as an independent metalanguage and reality in itself capable of grounding the meaningfulness of human language and

knowledge (and law). "God" is revealed as a "name for language," that is, as a name, given by metaphysical thinking, to the fact of linguistic signification, to the taking within meaning of beings. In other words, modern Western humanity is thrown to its "own words," to the contingency and groundlessness of all meaning, which ushers it into crisis.

The crisis is that of nihilism. Nihilism "interprets the extreme revelation of language in the sense that *there is nothing to reveal*, that the truth of language is that it unveils the Nothing of all things. The absence of metalanguage thus appears as the negative form of the presupposition, and the Nothing as the final veil, the final name of language" (Agamben, 1999, p. 46, my emphasis). The crisis of the presupposition of God-created, human-independent reality of which language speaks and that language can bring to signification leads to nihilism in which reality counts as nothing, in which language reveals nothing but itself and itself as empty speech unable to speak about anything but itself. Only a short step from here to the affirmation that everything collapses into particular languages and particular functional rationalities of social systems that reveal nothing but their mere contentless operation.

What is then at stake in philosophy, for Agamben, is a critique of this nihilistic interpretation of the revelation of linguistic signification and the crisis of the presupposition. Drawing from Wittgenstein's illustration of philosophy as showing a way out for the fly trapped in the bottle (Wittgenstein, 2009, § 309), Agamben writes: "What does it mean to see and to expose the limits of language? (For the fly, the glass is not a *thing* but rather *that through which* it sees things.) Can there be a discourse that, without being a metalanguage or sinking into the unsayable, says language itself and exposes its limits?" (Agamben, 1999, p. 46, original emphasis). The task of philosophy is to bring to expression the limits of language, that what tradition has betrayed by simply presupposing and making invisible, that is, to bring to expression the unspeakable: *the very taking place of language itself* as the medium through which things appear intelligible. Its task is to expose the presupposition itself, the very opening of meaningfulness as such, that has been either mystified as the ineffable foundation or, in nihilism, reduced to mere foundationless and meaningless speech. It is not that language reveals nothing, a mere loss of foundation; it reveals its own taking place, which makes meaning possible. The task of philosophy is to attend to this experience of language in its *inoperativity*, not in its normal communicative operation that always renders itself invisible and unspeakable as a medium (which is Luhmann's choice as a sociologist), but in the manifestation of the potentiality of linguistic signification as such. What Agamben thus proposes, as Prozorov notes, is "this experience of occupying the *threshold* of speech that provides a resolution of the problem of negative foundation" (Prozorov, 2014, p. 73) (my emphasis). It is the very occupation of what we have been calling the inclosure paradox, without always already seeking to fictitiously "solve" it like Luhmann does, that provides, for Agamben, the solution to the ineffability of language itself.

Agamben thus rejects the onto-theological orientation to totality when he rejects the view that self-reference cannot be said in language and must remain unspeakable, a position which leads to mystifying metalanguages or nihilism. It is not

that self-reference, the language showing its own taking place, cannot be said: it can be said, although only inconsistently. He also rejects the nihilistic orientation to paradox that says that self-reference simply collapses into what it is, into its actual empty operation. As a paradoxico-critical thinker, for Agamben, it is the threshold, the very inclosure paradox that, arresting the normal communicative operation, shows language in a state of inoperativity and impotentiality: in its irreducibility to any communicative function, in its freedom "not to express" anything particular. Such freedom is the precondition for every "new use" of language, like the poem that "is precisely that linguistic operation that renders language inoperative" and uses language in a new way that breaks with language's communicative function (Agamben, 2011b, pp. 251-252). See, in the following quote, Agamben's metalogical choice in favor of the inconsistent, but complete, totality (we come to the "naked life" he mentions in a moment):

> A completed foundation of humanity in itself should signify the definitive elimination of the sacrificial mythologeme and of the ideas of nature and culture, of the unspeakable and the speakable, which are grounded in it. In fact, even the sacralisation of life derives from sacrifice: from this point of view it simply abandons the naked natural life to its own violence and its own unspeakableness, in order to ground in them every cultural rule and all language. The *ethos*, humanity's own, is not something unspeakable or *sacer* that must remain unsaid in all praxis and human speech. Neither is it nothingness, whose nullity serves as the basis for the arbitrariness and violence of social action. Rather, it is social praxis itself, human speech itself, which have become transparent to themselves. (Agamben, 2006, p. 106)

The decisive difference between Luhmann and Agamben is the following. Luhmann is satisfied in describing how, with the help of functional equivalents to premodern metalanguages, the legal system is able to constantly invisibilize its inconsistent nature as a systemic perspective and hide its own taking place as an opening, which pushes his account close to nihilism. Agamben's emphasis as a critical thinker falls, by contrast, on how such invisibilization perpetuates the inclusive exclusion. He investigates how the excluded, the unspeakable and the unknowable, what is always presupposed in the communicative operation but what remains included in it in the mode of exclusion, can be brought to expression. His focus is on "the betrayal" of the ineffable and the unsayable that makes all traditions and evolutions, whether linguistic, epistemological or legal, possible. To trace the roots of our contemporary predicaments of, say, "war against terror" or refugee camps, back to a structure analogous to the very structure of language certainly implies that any truly transformative politics encounters daunting problems. However, Agamben's discussion of the philosophy of language as attending to language in the state of inoperativity in which its potentiality "not to" and new possible use can be seen, already suggests that, for him, the task of politics is to recuperate inoperativity and impotentiality — the paradox — from its dominating manifestation in the legal-

governmental-biopolitical apparatus. But in line with the claim that modern nihilism brings us face to face with language and thus forms a momentum for expressing what has not been possible to express in the tradition of Western onto-theological thought, we will see that, for Agamben, it is the figure of the exception and the state of inoperativity and impotentiality it implies that carries the seeds not only of destruction of life but also its redemption.

4.3.5 Indication and the Voice

Before going to Agamben's analysis of the contemporary nihilistic political situation, let us continue for a little while with the structural analogies that Agamben sees between language and law. A central problem in his thought can be seen to be the same that we identified already in the Introduction with Wittgenstein: how can language and law relate to fact and life? We have been discussing blind spots and first and second order observation, which always, even in the case of an observation of observation, operate inconsistently, or on grounds of a blind spot. Agamben speaks of the thing itself and the sayability that itself remains presupposed and ineffable within language and law. What cannot be directly expressed, can only be *manifested or indicated*. Agamben shows that example and exception are two logical figures in which the relation of law/language to reality becomes itself thematic. At odds are then the operation of language and law that renders ineffable or invisible its own nature as a contingent opening, and the manifestation of this opening by the example and the exception (that, in Agamben's analysis, has been colonized by the governmental apparatus).

Wittgenstein's solution to the problem between law and life was the notion of "the form of life": the genesis of relatively stable patterns of use of words/rules will help to determine the meaning of words, or correct and incorrect use of rules (Wittgenstein, 2009, §§ 23, 43, 241). It could then be said that a certain normalization of language/law, the formation of a "linguistic/legal tradition," if you will, is necessary for the ability of words to have relatively stable and determinate meanings and norms to have relatively stable and determinate applications and followings. That a tradition, a form of life, itself is not, however, an objective metalanguage capable of providing flawless consistency to the use of rules was already suggested by our discussion of the example and the exception (see Introduction).

What is an example? An example is, as we saw, an instance of language, or normatively regulated behavior, that not only uses language and the rule but also makes this use explicit. An example *demonstrates* how the general and abstract relates to the particular and factual: it occupies the very place of application of rule to fact itself and indicates that this is what it does. An example shows the very happening of the relating to the fact of a norm or a word. "Exemplary being," Agamben writes, "is purely linguistic being. Exemplary is what is not defined by any property, except by being-called. Not being-red, but being-*called*-red; not being-Jakob, but being-*called*-Jakob defines the example" (Agamben, 1993, p. 9, original emphasis in the original).

To command somebody to "be an example!" is to command that this person make manifest in her behavior how one ought to behave — how one ought to correctly use, follow or apply, a norm or a rule — in a given situation. An example manifests the normal that the tradition establishes and iterates but that usually remains unreflected and taken for granted. It shows that and how a norm *takes place*, without itself being merely defined by the norm. By doing so, it also shows in this localized manner that the problem of explosion that the paradox of rule following indicates can be avoided — and has successfully been avoided within the form of life that the example exemplifies. An exception, for its part, holds the inverse logical place: it makes manifest the suspension of the application of law to the fact. It indicates both that normally there is a taking place of law, that normally a rule is applied to facts and facts follow a rule (in ways made manifest by the example), and that at this moment, this application has been withheld. An exception shows that there is a legal order but that now this order is not actualized.

Now, what the logic of the example and the exception suggests is the importance of *indication* for law. If Wittgenstein's rule paradox exposes that the relation of the rule to fact, its application and following, is problematic, then finding ways to *indicate* this relation within law is of crucial importance. An example and the exception are two names for indicating the relation itself of the general norm to the particular factual situation that it regulates or from which it withdraws. But there are also others. What linguistics calls indexicals — "here," "there," "now," "tomorrow," "I," "you," "we," "ours" — and quasi-indexicals such as "own," can also be seen to function in the same manner. Agamben points out that "[i]ndication is the category within which language refers to its own taking place" (Agamben, 2006, p. 25). For him, the problem of "sense and reference" is as central as it is to all other philosophers of the so-called "linguistic turn," Wittgenstein included (see Livingston, 2012, pp. 37-42; Clemens, 2008, pp. 43-45). Indexicals are those parts of the speech act the reference of which shifts at every occasion of speech: what I refer to now as "tomorrow" will be different from what I tomorrow refer to as "tomorrow." Indexicals locate discourse to a speaker and to a time and place, and in this way they "refe[r] exclusively to [the] taking place [of the speech act], to its instance, independently and prior to what is said and meant in it" (Agamben, 2006, p. 25). Justin Clemens explains that deixis "(1) anchors utterance to its speaker; (2) refers to the situation of its own taking place (one might even say 'locution, location'); (3) is supposed (or is at least implied) in every utterance; (4) must always be repeated, must always take place again" (Clemens, 2008, pp. 46-47, emphasis omitted.)[46] As Paul M. Livingston notes:

> [i]t is *only* by way of the capacity for deixis, for saying "here," "now," and above all "I," that *a subject indicates its own assumption of the enunciative function*, its own paradoxical capacity (which remains without name [i.e. ineffable, HL]) to move from the abstract reality of the rules of langue to the actuality of their real application in concrete discourse. (Livingston, 2009, p. 309, my emphasis.)

[46] These features of deixis are also central to Lindahl's theory of law as "collective action" and we return to the problem of indication when discussing his work.

Indication is thus an *intra*-linguistic manifestation (that, normally and traditionally, remains unsayable) of the shift from langue to parole, from the code to message (Clemens, 2008, p. 47). Agamben gives this manifestation of the taking place of language that we always tend to forget the name "Voice" (Agamben, 2006, p. 35). Indexicals receive their meaning and can indicate the instance of discourse when a human voice speaks them. The Voice is the name for how the enunciation in which *langue* shifts to *parole* and delivers langue to world has been traditionally understood. Its structure is, once more, that of inclusive exclusion: human voice is separated from itself, included as linguistic expression and excluded as the Voice. Human voice allows language to anchor itself in an instance of discourse, and only through voice is an instance of discourse identifiable as such (Agamben, 2006, p. 32). But the voice itself remains unsayable and presupposed. The Voice is the zone of indistinction between mere sound (*phonē*) and human language (*logos*), it is the removal (exclusion) of the mere "animal *phonē*" from meaningful language that must nevertheless presuppose (include) this "animality" in order to find its presence in the world, in time and place. Once more we encounter a liminal figure — "of a *no-longer* (voice) and of a *not-yet* (meaning)" — (mis)understood as simply ineffable in the history of philosophy, suggesting that the task of philosophy is to provide a re-appraisal of indication, of the Voice and its paradoxical structure (Agamben, 2006, p. 35, original emphasis).

The Voice, the example and the exception can indicate how language relates to fact, or that this relating has been suspended for now, only because they are paradoxical limit figures, both within language and without it. Agamben also notes that:

> [e]xception and example constitute the two modes by which a set tries to found and maintain its own coherence. But while the exception is, as we saw, an *inclusive exclusion* (which thus serves to include what is excluded), the example instead functions as an *exclusive inclusion*. (Agamben, 1998, pp. 21-22, original emphasis.)

The Voice, the example and the exclusion are all indications of the blind spot, the very relation of the rule and language to fact. The example and the exclusion do so, however, in diametrically opposite ways. An example both is a normal case of following a rule and is not because it indicates this normality: it "*shows* its own signifying and in this way suspends its own meaning" (Agamben, 1998, p. 22, original emphasis). It excludes itself from the normal case to exhibit belonging to, inclusion into it. An exception also suspends the normal signifying, but in order to indicate its non-belonging to the rule. For Agamben, the example and the exception "are ultimately indistinguishable and [...] come into play every time the very sense of the belonging and commonality of individuals is to be defined" (Agamben, 1998, p. 22). This suggests that a re-appraisal of indication in philosophy would go hand in hand with a re-appraisal of belonging and commonality in the political sense.

4.3.6 Abandonment and bare life

Let us now finally articulate the structure of inclusive exclusion in its legal-political register. Life that is both presupposed and to which law forms a relation is what Agamben calls "bare life." Bare life is structurally similar to the Voice, and it is formed in the inclusive exclusion of life in/from the legal order. The notion of bare life presupposes the distinction between the mere fact of life, or what the Greek antiquity called *zoe* and conceived as shared by gods, humans and animals alike (and thus without determining predicates), and the properly human life lived in the *polis*, named as *bios* (Agamben, 1998, p. 1). "Bare life" is then formed by the "re-entry" of mere fact of living into political life. Political life, the preferred side of the distinction *zoe—bios*, "re-enacts" (includes) within itself what it has excluded from itself, i.e. mere living, thus forming a political conception of non-political life: bare life.[47] For Agamben, "[t]he originary structure of Western politics consists [thus] in an *ex-ceptio*, in an inclusive exclusion of human life in the form of bare life" (Agamben, 2016, p. 263). Bare life is life that in the hierarchical (because preferential) re-entry "has been cut off and separated from its form" (ibid.), whatever form it has or would have had the potentiality to have beyond the inclusive exclusion. As a negative foundation, in bare life "something [life] is divided, excluded, and pushed to the bottom, and precisely through this exclusion, it is included as *archè* and foundation" (Agamben, 2016, p. 264). Political life in the city is founded on the exclusion, made on the side of political life, of mere life. The same old presuppositional logic that grounds language is repeated in a political register.

What this inclusive exclusion of bare life then amounts to, according to Agamben, is what he (following Jean-Luc Nancy) calls "the ban": "this potentiality (in the proper sense of the Aristotelian *dynamis*, which is always also *dynamis mē energein*, the potentiality not to pass into actuality) of the law to maintain itself in its own privation, to apply in no longer applying" (Agamben, 1998, p. 28). To the same extent that the law includes and actualizes its potentiality as a normative force, it also excludes, suspends this potentiality and withdraws itself from the living and thereby bans them from the law, abandons them. "[I]f the law employs the exception," Agamben argues, "as its original means of referring to and encompassing life, then a theory of the state of exception is the preliminary condition for any definition of the

[47] Luhmann's sociological position on life is nearly the opposite to Agamben's diagnosis of life and politics becoming in *actual political reality* indistinct in the figure of the bare life. As Anton Schütz explains: "This relation [of law and life] is placed under the sign of its successful interruption in Luhmann, who celebrates, as the decisive *coup de génie* or evolutionary achievement on which functional differentiation and indeed the very workability of hypercomplex societies are predicated, the closure of social autopoiesis from both the autopoiesis of organism and the autopoiesis of consciousness" (Schütz, 2000, p. 112). Agamben's thesis on the state of exception becoming a "new normal" would signify the collapse of functional differentiation between the legal and political systems. Luhmann is not, except in the case of National Socialist State, prepared to make such a sweeping diagnosis that the evolution of the modern society has been overturned (although it is of course an evolutionary possibility).

relation that binds and, at the same time, abandons the living being to law" (Agamben, 2005a, p. 1). By the ban and abandonment Agamben does not simply mean that while these human beings are included and made legal subjects, those others are excluded. He rather means that because the taking within the law of life as legally intelligible is also an exclusion of that life, life is "abandoned" *to this ambiguity*, to this "as" that brings together and separates, to this paradox and zone of indistinction between inclusion and exclusion. Bare life is life at the limit between law and non-law, neither fully outside, nor fully inside.

Agamben understands the exception as an abandonment of life to an ambiguous state in which the law is in force but without protective significance, which implies that life is thereby "exposed and threatened" by anomic sovereign violence (Agamben, 1998, p. 28). Life is both abandoned from the law's protection (say, in the form of fundamental rights) and, in the worst case, abandoned to unmediated sovereign violence. An exception, Agamben explains, is how "non-belonging can be shown [...] at the center of the class" (Agamben, 1998, p. 22). In the exception, bare life shows its non-belonging to the juridical-political class of objects, shows its very not-being-protected-legally, by being included within the class only in terms of an exception to the normal case (i.e that of being protected by the norm). It is included in law as excluded from its protection allowed to "the normal case."

The sovereign and bare life are mirror images of each other. Both are structured by the inclosure paradox of "*[b]eing-outside, and yet belonging*" (Agamben, 2005a, p. 35) (original emphasis). The logic of inclusive exclusion is, according to Agamben, at the heart of all sovereign power, ancient or modern (Agamben, 1998, p. 9). Because all forms of social order, even language, are constitutively paradoxical, have a zone of indistinction at their heart and capture life by splitting it, Agamben can also argue that "[b]iopolitics is as old as the sovereign exception" (Agamben, 1998, p. 6).[48] Western antiquity excluded bare life from the *polis* as exemplified by a figure in the archaic Roman law, *homo sacer*, an individual who has been cast out of both the religious and human community as a punishment and can thereby be killed without committing murder although not sacrificed. What is specific to modernity, is that bare life is no longer merely pushed to the margins of the *polis*, but becomes its dominating figure (Agamben, 1998, p. 8-9). In conditions of modern nihilism and loss of metaphysical foundations of social order, the contingent and irreducibly paradoxical (non-)ground of legal-political order is increasingly difficult to hide. As the state of exception becomes a regular technique of government, the paradoxical structure of legal-political order begins to displace the application of the rule as the normal juridical state (Agamben, 1998, p. 20).

[48] This claim is the core of Agamben's critique of Foucault's conception of biopolitics as something quintessentially modern and different from sovereign power (see e.g. Prozorov, 2014, pp. 93-99).

4.3.7 The normalized state of exception

The choice of the word "abandonment" already suggests that for Agamben, the paradox of law/sovereignty is a very insecure and risky place to be: the zone of indistinction is a site of undecidability, it is the site of explosion of the rule in which no security as to which direction one ought to go can be found. As we have noted, the nihilistic loss of grounds and the crisis of the presupposition that characterize Western legal structures signifies, for Luhmann, a new challenge for the legal system to secure the space for legal security. For Agamben, by contrast, it rather opens the space for the growth of executive authority and government of life in a state in which legal security and its (fictional) consistency count less and less. "As long as the two elements" of authority and power, sovereignty and law, decision and rule "remain correlated yet conceptually, temporally, and subjectively distinct (as in republican Rome's contrast between the Senate and the people, or in medieval Europe's contrast between spiritual and temporal powers)," Agamben writes:

> their dialectic — though founded on a fiction — can nevertheless function in some way. But when they tend to coincide in a single person, when the state of exception, in which they are bound and blurred together, becomes the rule, then the juridic-political system transforms itself into a killing machine. (Agamben, 2005a, p. 86)

In Agamben's analysis, the exposure of the paradox of sovereignty, its being inside and outside the law, in a state of exception that becomes the regular state of affairs, is by no means a liberating moment (as I suggested above), but rather a moment of the exposure of the violent origins of the legal order and the capture of life as bare life.

As we have known since our study of Kelsen, *the legal fiction*, the establishment of the "as" that allows the legal perspective on reality, is what joins and separates power to/from a legal power, act to/from a legal act, violence to/from a legal violence, social order to/from a legal order, revolution to/from treason, living being to/from a legal person, political constituent act to/from act of constituted power. Agamben suggests that the dialectic this fiction opens may have functioned relatively well in the history of Western politics, but today its very nature *as a fiction* has become exposed and the ambiguity of the relation has become visible. The "final" juridical fiction is Schmitt's *fictio iuris* that the state of exception functions as the guardian of the constitution. For Agamben, this fiction can, and must, now be seen for what it is: a fiction that seeks to cover a political reality in which law and the force of legal rules have withdrawn to a virtual existence of impotentiality, of being "in force without significance" (Agamben, 1998, p. 51), thereby increasingly giving space to the biopolitical and legally unmediated governing of life as bare life.

Although Luhmann would not agree with Agamben's diagnosis that the state of exception has become a new normal, Agamben's account does confirm Luhmann's

insistence on the necessity for the legal system's continuous *autonomous* operation to make its paradox invisible. If the inconsistency at the heart of the legal system is continuously exposed in the exception, as it is if we concur with Agamben's diagnosis, law becomes utterly virtual, losing its directive "force" in society, abandoning living beings at the mercy of the governmental biopolitical apparatus. In a sense, what Agamben describes as our contemporary modern condition is the explosion of the rule. In the state of exception that has become the normal state, no distinction between inside and outside the law can be made, so the law coincides with reality. It is, as in Wittgenstein's paradox, impossible to distinguish between behavior that follows a rule and behavior that transgresses it (Agamben, 2005b, p. 105). Legal acts, such as walking down the street after curfew, may be seen illegal, and illegal acts, such as mob violence against political protesters, may be allowed if politically expedient (Prozorov, 2014, p. 102). The ultimate anomic space of the explosion of the rule is the Nazi concentration camp: when the Nazi party suspended articles of the Constitution, it became impossible to formulate laws, and when no laws discriminate between licit and illicit, "everything becomes possible" (Agamben, 2005b, p. 106).[49] The exposure of the zone of indistinction at the heart of the legal order has given, according to Agamben, all the space to governmental power to target life in a legally unmediated way, while still upholding the legal fiction of the sovereign suspending the law for the benefit of the law. In Agamben's controversial diagnosis, since World War One, National Socialism and up to our day, the normative force of law has suffered and been contradicted by the impunity of governmental violence and ignorance of international law to which corresponds domestic restriction of fundamental liberties (Agamben, 2005a, p. 87; see also e.g. Deranty, 2008; Lechte & Newman, 2013, pp. 96-118).

> Now that *any possibility of a fictitious state of exception* — in which exception and normal conditions are temporally and locally distinct — *has collapsed, the state of exception "in which we live" is real* and absolutely cannot be distinguished from the rule. Every fiction of a nexus between violence and law disappears here; there is nothing but a zone of anomie, in which *a violence without juridical form* acts. The attempt of state power to annex anomie through the state of exception is unmasked by [Walter] Benjamin for what it is: a *fictio iuris* par excellence, which claims to maintain the law in its very suspension as force-of-~~law~~. What now takes its place are civil war and revolutionary violence, that is, a human action that has shed [*deposto;* deposed, overthrown] every relation to law. (Agamben, 2005a, p. 59, my emphasis.)

Agamben dates the notion of a "fictitious or political" state of exception back to Napoleon's decree from the year 1811 that provided for the possibility of the emperor to declare a state of siege regardless of whether a city was actually under attack or

[49] See also Hannah Arendt's account of how in totalitarianism "everything is possible" and how this differs from the more traditional nihilistic claim that "everything is permitted" (Arendt, 2017, p. 440). While the latter form of the suspension of the rule is, according to Arendt, the usual form of utilitarian advancement of the interests of the ruler, the first, totalitarian suspension of the rule loses all connection to all forms of utility and becomes purely ideological.

threatened by enemy forces. Agamben's argument is that gradually the notion of the state of exception has been detached from any notion of a (wartime or other) necessity and thus fully politicized or fictionalized (Agamben, 2005a, pp. 4-5). This becoming independent of any supposedly "real" necessity means that the state of exception, in the form of the expansion of the powers of the government to control the civil sphere that take on features of military authority's wartime powers, the narrowing down of citizen's constitutional liberties and the erosion of the legislative powers of the parliament in favor of governmental decrees, is normalized and increasingly becomes "a technique of government rather than an exceptional [and thus only temporary] measure" (Agamben, 2005a, p. 6-7). This, Agamben famously argues, leads to the blurring of the difference between democracies and totalitarian states (Agamben, 2005a, p. 3). On the other hand, Agamben, drawing from Benjamin's notion of the "real state of exception" (Agamben 2005a, p. 57; Benjamin, 1968, p. 257), which is the collapse of the legitimating fictions in the contemporary nihilistic political situation, also notes the possibility of human action to "shed every relation to law," to put the exhausted, paradoxical law itself to an "end." We return to this "messianic politics" beyond all law in the final subsection.

As Anton Schütz observers, for Agamben, the demarcation line between law and life:

> functions as a triggering or enabling device for its own transgression, an indicator of *an always colonisable, indefinitely politicisable territory*. It is this last point that, far from inducing it into the standstill of a paradox, gives its spin, its dynamic, to the legal/sovereign institution. The space declared improper for politics is singled out and indicated as the space of politics properly speaking. (Schütz, 2000, p. 122, original emphasis omitted, my emphasis.)

The dynamism of nihilistic law thus means, for Agamben, that *all legal limits are transgressible in favor of the biopolitical government of life*, that there are no legal limits to the sovereign power's reach, only the shallow shell of a legal fiction that functions as a transparent attempt to legitimate biopolitics. There is nothing that can restrict the operation of sovereign biopolitics. For Agamben, the exception and the inoperative law function as a device with which to politically target whatever and with whatsoever means the sovereign deems necessary. In a kind of inverted (and perverted) image of the full inclusion to a universal legal order without exclusion as the telos of a fully human humanity that, as we saw in the Introduction, characterizes the "criteriological orientation" to legal-political totality, Agamben understands with the state of exception becoming a norm a "universal" (global) condition of the capture of human life within the sovereign ban that severs this life from whatever forms it might have otherwise taken — severs it from *its* im-potentiality — and includes it in the juridico-political sphere that has in conditions of nihilism no other aim or goal than the very governing of that life as bare life. The device of the suspension of the

application of the law signifies, in the ultimate case, the global, nihilistic domination of life in the biopolitical apparatus (Agamben, 2005a, p. 2).

4.3.8 The *Katechon*

What Agamben claims to observe is the coming into light of the logic of the *katechon*, or the immunologic of the sovereign as the guardian of the constitution that turns auto-immune, that is, against what it was supposed to protect. This logic is the "vicious circle in which the emergency measures [...] justif[ied] in the name of defending the democratic constitution are the same ones that lead to its ruin" (Agamben, 2005a, p. 8). In *The Nomos of the Earth*, Schmitt discusses this biblical notion, the *katechon*, from Paul the Apostle's second letter to the Thessalonians; a notion that has later proved important to contemporary discussions in political philosophy on nihilism, biopolitics and the possibility of political change (see e.g. Esposito, 2011; Virno, 2008). In its biblical-escathological context, the *katechon* means "the restrainer": the power that withholds the Antichrist and therefore postpones the Second Coming of the Christ, as the "lawless one" must be revealed before *parousia*, the end of the world, will happen. Paul leaves the *katechon* unidentified, but Schmitt follows the tradition that interprets it as the Holy Roman Empire (Prozorov, 2012, p. 485). As a historical (secular) power, the Christian Empire "restrain[s] the appearance of the Antichrist and the end of the present eon" (Schmitt, 2006, p. 60). The imminence of the Christ's Second Coming would devalue historical and political action, so understanding the Empire as the *katechon* offers a way to link the eschatological promise with secular history, to give meaning to the secular power of the Christian State as what delays the end of the world by fighting against "the lawless one" (Prozorov, 2012, p. 485). To understand the Roman Empire as the *katechon* gives, according to Agamben, "the only possible foundation for a Christian doctrine of State power" (Agamben, 2005b, p. 109). Delaying the end gives meaning to human action.

As said, this seemingly arcane notion of *katechon* has been perhaps surprisingly important in recent discussions of the so-called "messianic turn" in continental political philosophy, that is, in the attempt to think about radical political change and, importantly for our present purposes, about political nihilism of the "lesser evil" that keeps radical change from happening. According to Agamben, "every theory of the State, including Hobbes's — which thinks of it [the state] as a power destined to block or delay catastrophe — can be taken as a secularization of this interpretation of 2 Thessalonians 2" that Schmitt's account epitomizes (Agamben, 2005b, p. 110). In Agamben's interpretation, the *katechon* is the name for the force of "every constituted authority" to delay "the state of tendential lawlessness that characterizes the messianic" (Agamben, 2005b, p. 111), that is, radical political transformation.

As Sergei Prozorov explains, in this discussion "the *katechon* refers to any constituted authority, whose function is to delay the social catastrophe while

simultaneously withholding a radical redemption from it" (Prozorov, 2012, p. 487). *Katechon* is the name for understanding collective self-preservation as a fight against what is excluded from the collective and identified as an existential threat to it against which the collective must be protected. As Esposito puts it, the restrainer "blocks the *anomos*, the principle of disorder, rebellion, separation from the constraint of law" (Esposito, 2011, p. 63). According to Agamben, Hobbes' theory of state can be understood as the paradigmatic secularization of the *katechon*. The function of the Hobbesian sovereign is precisely to constitute and preserve the body politic by warding off the threat of the dissolution of the commonwealth, the war of all against all. However, Agamben notes that the way in which the existential threat is fought against — ultimately by deciding on the state of exception — *itself* brings this threat of the *anomos* inside the commonwealth. This is the core, for Agamben, of modern biopolitical, autoimmune nihilism: the sovereign claims to fight against an existential threat to the collective existence (this is the juridical fiction of the guardian of the constitution) *by itself becoming that very threat* in the form of legally non-mediated violence. Esposito notes that "most important" in the notion of the *katechon* "is the way [the blocking of the *anomos*] takes place, the manner in which evil is restrained: the *katechon* restrains evil by containing it, by keeping it, by holding it within itself" (Esposito, 2011, p. 63).

Hobbes' theory of the state of nature and the social contract epitomizes this nihilism. Modern political theory of the state of nature thus imagines nothing "truly external to *nomos*" but rather "a principle inside the State revealed in the moment in which the State is considered 'as if it were dissolved'," that is, in the state of exception (Agamben, 1998, pp. 35-36, referring to Hobbes' *De Cive*). The Hobbesian sovereign is the "only one to preserve its *ius contra omnes*" after the social contract has been made: the natural law principle of the preservation of one's own life that is valid in the state of nature is preserved in the person of the sovereign (Agamben, 1998, p. 35). The war of all against all in the state of nature, that has, in fact, always been understood as a fiction and never as a historical condition, is nothing but a fictionalization of the political reality of the state of exception in the commonwealth (Prozorov, 2014, p. 105). The existential danger of the war of all against all that the social contract and the surrender of one's natural right to self-preservation to the sovereign were supposed to ward off is re-discovered at the heart of the commonwealth, in the sovereign decision of the state of exception that exposes all citizens to the legally non-mediated violence of the sovereign:

> Far from being a prejuridical condition that is indifferent to the law of the city, the Hobbesian state of nature is the exception and the threshold that constitutes and dwells within it. It is not so much a war of all against all, as, more precisely, a condition in which everyone is bare life and a homo sacer for everyone else. (Agamben, 1998, pp. 105-106)

The state of nature is not, in Agamben's reading, something that precedes the commonwealth, but it rather persists at the heart of the commonwealth in the form of

the "necessary" state of exception. The legal order is unable to unrelate itself from that against which it is constituted: disorder and anomie.

> The state of nature and the state of exception are nothing but two sides of a single topological process in which what was presupposed as external (the state of nature) now reappears, as in a Möbius strip or a Leyden jar, in the inside (as state of exception), and the sovereign power is this very impossibility of distinguishing between outside and inside, nature and exception, *physis* and *nomos*. (Agamben, 1998, p. 37)

This means, for Agamben, that justifying the sovereign as a "lesser evil" set against the "absolute evil" of the dissolution of the social bond is totally without justification, as it is the sovereign itself that is the "absolute evil" of the *anomos* that it claims to be fighting against. In Agamben's reading, as Prozorov notes, "the idea of the *katechon* is an insidious device, by which 'substantially illegitimate,' anomic power perpetuates its reign, diverting the quest for redemption to the preoccupation with protection against the 'greater evil' that requires obedience to the 'lesser' evil of constituted authority" (Prozorov, 2012, p. 488).

Nihilism here is about law's being in force without significance, its inability to properly function as law with a specific, (relatively) unambiguous *content*. A law that is in force without significance is a purely formal law, a law without content, a law that has lost credible consistency and legal security. It is a law that is unable to draw stable and credible legal distinctions and to distribute the code legal/illegal in a way capable of providing normative expectations that survive their disappointment. It is law that is formally in force only in order to provide the fiction that violence is perpetuated on the bare life not arbitrarily, but for the sake of the continued existence of the legal-political collective. Modern biopolitical nihilism is negatively founded on the inclusive exclusion of human life that abandons this life to the immediacy of sovereign power. This abandonment is concealed by justifying it as a "lesser evil" that wards off the lawlessness of the dissolution of the commonwealth altogether, although it is itself the evil it claims to fight against. Therefore, "the function of the *katechon* [can be understood] as a *double negation* or, more precisely, the negation of the originary negativity of the human condition" (Prozorov, 2012, p. 492), or indeed as the negation of the negativity at the heart of every self-grounding order. The negativity at the heart of social order, its lack of ultimate grounds, is understood as an existential threat to the order and this threat is then fought against, negated, with means that are themselves devoid of grounds. See here how the misfortune of attempts at making the paradox invisible (that they are condemned to repeat the problem that they seek to solve) manifests again in a different guise.

We can thus understand this double negation in terms of the logic of immunization. In immune protection, life is protected negatively: the very danger from which life is to be protected, is introjected within it as the very means by which to protect life against that danger. Indeed, to negate the foundational negativity of the legal system (lack of legality of its guiding distinction) by re-drawing distinctions that

seek to make this negativity invisible follows precisely the logic of immunization. If seen against this background, Luhmann's idea of the invisibilization of the foundational paradox by taking recourse to "ideology" that is itself paradoxical, for the sake of continued ability to operate and against "explosion," i.e. entropy and loss of order, could be read as a late, non-theological version of the idea of the *katechon*. The apparatuses of invisibilization restrain the apparition of the "Third Question" that could destabilize the system, but they only manage to do so by displacing the paradox into the new distinction that is supposed to make the old paradox invisible.

From this perspective, all thinking of dealing with the foundational paradox of law, with the lack of positive foundations of the legal order, by reproducing its originary gesture, the drawing of a distinction, is nothing but a negation of negation that perpetuates the negativity rather than solves the problem it poses. Conceiving modern law as nihilistic thus means that the unfounded and unjustifiable legal orders preserve themselves in existence by fashioning apparatuses that claim to ward off the evil of social disorder by means that themselves capture human beings into conditions of sovereign ban and violence. For Agamben, the immunologic of the state of exception turns autoimmune, biopolitics turns *thanatopolitics*, politics of death, at the latest when the state of exception becomes normalized, attacking the continued existence of law and life that it claimed to be protecting. The lack of ultimate foundation of social order has no other consequences for the order than its own re-affirmation in the form of yet another distinction that perpetuates "the evil" while claiming to be fighting against it.

4.3.9 Post-juridical politics

If the state of exception has now become exposed as the new normal, this nihilistic situation reveals the *katechon* for what it is, and its successful legitimation as a juridical fiction collapses. For Agamben, "messianic politics," politics of radical transformation, is then about the removal of the *katechon*, the deactivation of that which perpetuates the sovereign ban and withholds radical political change.[50] It is the gloomy modern nihilism itself that opens the momentum of change, as it not only shows the loss of foundations of social order but also exhausts the fictions that help to perpetuate the empty and violent operation of the biopolitical apparatus.

If "[m]an is the living being who removes himself and preserves himself at the same time — as unspeakable — in language [and law; HL]; negativity is the human means of having language [and law]" (Agamben, 2006, p. 85, emphasis omitted). What Agamben calls "sacralization" is rendering this self-removal and separation of human life from itself a mystical foundation of both language and rule, within which it remains unsayable (Agamben, 2006, p. 106). Negative foundation of language and

[50] For reasons of space, I cannot go into a detailed exploration of Agamben's "messianism." For example, Jessica Whyte (2009) and Daniel McLoughlin (2016) analyze the relation of Agamben's affirmative politics to the Aristotelian theme of potentiality, to Paul's messianism and the status of law in this "coming politics."

law remained veiled by such sacralization for centuries (it was, in Luhmann's terms, successfully rendered invisible), until modern nihilism. Nihilism is the exposure of the ungroundedness of the mystical foundation. The contemporary condition of the real state of exception exposes the first and last of the juridical fictions — the *katechon*, the state of exception as what protects the collective from a yet greater evil — for what it is. "The condition of modern nihilism," then, "has thoroughly desacralised every mystical version of the unspeakable foundation so that all that remains as the negative foundation is simply *nothing*, not an alluring and tempting Nothing that we could marvel at but a mere nullity devoid of any possible significance" (Prozorov, 2014, p. 73, original emphasis). The only task that remains in nihilism is the empty governing of bare life.

For Agamben, it is precisely the investigation into the relation of law and life, the juridical and the political, in conditions of contemporary nihilism that, he wagers, allows us to answer the persistent question: "what does it mean to act politically?" (Agamben, 2005a, p. 2). It is precisely contemporary nihilism, he suggests, that opens the possibility of a new politics of overcoming the biopolitical apparatus and putting it to an end (Agamben, 2006, p. 92). Political action capable of breaking with contemporary nihilism and life's capture within its apparatuses cannot take the form of seeking to go "back within [law's] spatially and temporally defined boundaries in order to then reaffirm the primacy of a norm and of rights that are themselves ultimately grounded in it. From the real state of exception in which we live, it is not possible to return to the state of law" (Agamben, 2005a, p. 87). The program of the likes of Habermas and neo-republicans who seek to re-ground the political collective in law ultimately fails, because they overlook the inconsistency at the heart of that collective. Law is incapable of controlling the exception because it is founded on it, and, in Agamben's analysis, the contemporary world lives its ultimate implications. For this reason, in the normalized state of exception in which the *fictio iuris* and its coupling of law and life is exposed in its artificiality, political action can only consist in making the inoperative, but biopolitics-perpetuating law itself inoperative, that is, de-activating the confinement of human impotentiality to the biopolitical apparatus.

The very inoperativity of law in the state of exception already shows the way for the new politics that, for Agamben, can only consist in affirming impotentiality and inoperativity *beyond* their confinement to the sphere of sovereign biopolitics. Political action is about re-affirming the potentiality of human life *not to be* confined as bare life within the sovereign, biopolitical apparatus grounded on the "final" (finally exposed) juridical fiction of the *katechon*. It is about "saving" the tasklessness of human life from its reduction to biopolitical nihilism:

> [I]f it is possible to attempt to halt the machine, this is because between violence and law, between life and norm there is *no substantial articulation*. Alongside the movement that seeks to keep them in relation at all cost, there is a countermovement that, working in a reverse direction in law and in life, always seeks to loosen what has been artificially and violently linked. (Agamben, 2005a, p. 86, my emphasis.)

The articulation between violence and law, life and norm is only a contingent juridical fiction that has succeeded in separating life, and its potentiality, from itself, confining life within the juridical, prohibitive apparatus and ultimately abandoning it to sovereign violence. The *fictio iuris* of modern law lifts certain acts of political power as well as human life into a sphere of the juridical. This is a form of their sacralization, Agamben suggests, that divests the founding violence from its contingency and gives it an aura of legitimacy. It also separates human life from its potentiality-not-to and sends it to a legally enforced destination. As Daniel McLoughlin notes, "[t]he 'cognitive goal' of the fiction of sovereignty is to conceal the originary inoperativity of the law, and thereby to hide the illegitimate foundation of state power and the radical groundlessness of human action" (McLoughlin, 2016, p. 524). We return to Luhmann's idea of the legal system's necessity of making its constitutive inconsistency invisible, with the difference that for Agamben, in the normalized state of exception in which the paradox, the zone of indistinction between *nomos* and *anomos* is exposed, even the final attempt at making the inconsistency invisible collapses. From Agamben's perspective, Luhmannian invisibilization is precisely a sacralizing instrument that seeks to entrench the separation of contingent acts and life from their contingency and their confinement into a juridical sphere where their "true" meaning is disclosed — despite the contemporary nihilism that has already exposed the invisibilization as a mere fiction without ground.

Agamben characterizes the contemporary nihilism as "imperfect," as it both exposes the ungroundedness of social order and yet seeks to keep them operating. He opposes to it Walter Benjamin's "messianic" or "active" nihilism that seeks the de-activation of this empty operation: "Confronted with the imperfect nihilism that would let the Nothing subsist indefinitely in the form of a being in force without significance, Benjamin proposes a messianic nihilism that nullifies even the Nothing and lets no form of law remain in force beyond its own content" (Agamben, 1998, p. 53). The normalized state of exception in which we live must be made into, as Benjamin puts it, a "real state of exception" in which even the empty operation and subsumption of life to the biopolitical apparatus is suspended (Agamben, 1998, p. 55; Benjamin, 1968, p. 257). Bringing about the real state of exception means rendering inoperative the inoperative law that still allows the separation of life from its impotentiality; it is about bringing nihilistic law to its "fulfillment," that is, to its end (Agamben, 2005b, p. 107).[51] "Only if it is possible to think the Being of abandonment *beyond every idea of the law* (even that of the empty form of law's being in force without significance) will we have moved out of the paradox of sovereignty towards a politics freed from every ban" (Agamben, 1998, p. 59, my emphasis). If law operates by separating life from itself and from its impotentiality, sacralizing impotentiality into a particular sphere, "actively

[51] Agamben develops the idea of the inoperativity of the operating law in the conditions dominated by the *katechon* in his discussion of Paul's messianism (Agamben, 2005b). Paul writes: "the messiah is the *telos* [namely, end or fulfillment; GA] of the law" (Romans 10:4), which, Agamben interprets, is the same as deactivating the operation of the law.

nihilistic" politics that brings "imperfect nihilism" to an end brings also this empty law to its "end," renders it inoperative.

Given that a legal fiction is a *representation* that discloses something as something, allows something to be taken within the law that simultaneously remains unrepresentable within it, it is unsurprising that Agamben would also emphasize the *representatives* of the sovereign as the ones with whom the struggle over the confinement of life within the sovereign ban is fought. In his reading of Kafka's *Before the Law* and *The Castle*, Agamben notes that for Kafka's protagonists that expose key features of the structure of law in their struggle with it, "the struggle is not against God or supreme sovereignty [...], but against the angels, the messengers and the functionaries who appear to represent it. [...] It is not a question [...] of a conflict with the divine [the sovereign], but of a conflict with the fabrications of men (or of angels) regarding the divine [the sovereign]" (Agamben, 2008, p. 25). For Agamben, the end or fulfillment of law is illustrated in Kafka's "Before the Law," in which the door of the law finally closes at the end of the story, "the man from the country" having waited at the doorstep his whole life, without ever crossing it (Agamben, 1998, pp. 49-57).

Political action is then a struggle with legal representation as a structure of separation. It is about deactivating representation that relates life to law by separating it from the forms it might otherwise take, exposing the fictional and sacralizing nature of representation, and targeting the "as if" by affirming the "as if not" (inoperativity) instead. Politics "seeks to deactivate the law by neutralizing the claims to legality made by those who present themselves as its guardians" (McLoughlin, 2016, p. 527). Politics does not destroy law, its end cannot mean any anarchist destruction of the law, but neither does politics posit a new law — it is not what the tradition of political thought has called "constituent power" (Agamben, 2016, p. 104). At stake is rather suspending the artificial and entrenched (non-)relation between human life and its legal articulation, and in our contemporary world, suspending the final fiction of the legitimacy of the state of exception, in order to liberate human life to *its own* impotentiality that characterizes it always already, although captured in the sovereign ban.

Thus, Agamben argues that to the withdrawal of law in the state of exception that has become the new normal, which implies the blurring of rule and fact, leading to the deathly statement "everything is possible," corresponds the separation of human beings from their impotentiality, from their capability *not to* do what contemporary apparatuses (not only of biopolitical government, but also capitalist economy) demand of them. "[D]eprived of the experience of what he can not do, today's man believes himself capable of everything," "freely" choosing between "jobs, vocations, professional identities and social roles" that there are on offer. In reality, he has become blind to his "consign[ment] in unheard of measure to forces and processes over which he has lost all control," to "this flexibility that is today the primary quality that the market demands" from everyone (Agamben, 2011a, pp. 44-45). Politics is then about restoring to human beings the experience of their capability not to do what social systems expect of them, opening the space for what Agamben calls "new use": "what is in question is the capacity to deactivate something and render it inoperative—a power,

a function, a human operation—without simply destroying it but by liberating the potentials that have remained inactive in it in order to allow a different use of them" (Agamben, 2016, p. 273). Political action in contemporary conditions of nihilism is then about seeking to suspend the suspension of the legal order that gives space only to biopolitical government, thereby opening life to new forms, to other aims than the ones within which it has been captured.

In what sense, then, is Agamben's "coming" or "messianic politics" post-juridical and anti-representative, and what does the "ending" of the law mean for our perspective of the legal paradox?[52] As we noted above, for Agamben, the task of philosophy is to express the very taking place of language: to thematize the medium of the glass through which the fly sees the world, which may then help the fly to escape from the jar into which it has been confined. In a way exactly analogous to this task of philosophy, the task of politics is to thematize the law as the medium that operates by separating life from itself. It is to seek to show all legal categories and identities as suspended from their operative actuality and thematized as such. Agamben suggests, enigmatically, that to bring the law to its end and fulfillment, to a state of inoperativity, is to reject the "process of infinite deconstruction that, in maintaining the law in a spectral life, can no longer get to the bottom of it" (Agamben, 2005a, p. 64). While the paradox works as the deferral and referral of meaning in the operation of law, just like we saw in our study of the Luhmannian invisibilization of inconsistency, making possible the dynamic evolution of the legal system, Agamben wishes to put this evolution to a halt. "The decisive point here is that the law — no longer practiced, *but studied* — is not justice, but only the gate that leads to it" (Agamben, 2005a, p. 64, my emphasis).

Law that is studied, rather than practiced, makes law itself as an inconsistent totality thematic, suspending its actualization in particular judgments that represent living beings as this or as that, restoring to both the law and the living beings their impotentiality that biopolitics abuses (and in this way it may be the gate to justice). The intimate relation between law and study is noted by Agamben in his essay "The Idea of Study," where the "exemplary embodiment of study in our culture" is named Melville's Bartleby, the scribe at a Wall Street lawyer's office, who one day begins to "prefer not to" do his duty to copy legal documents (Agamben, 1995, p. 65; see also Whyte 2009). Against the law's self-imposed duty to deliver the decision and thereby reproduce itself and suspend its impotentiality, the study of law impersonated by its scribe who "prefers not to" copy its documents shows the law's impotentiality: its potentiality not to pass the judgment.

Agamben suggests, then, that philosophy and politics are both about inhabiting the paradox, insisting on the ultimate inability to construct hierarchical oppositions and unproblematic representations. As David Kishik notes:

> [Agamben's] conviction is that virtually every important opposition that we can think of is today irreparably lost, that it is no longer possible to clearly draw a

[52] Catherine Mills (2008) and Jessica Whyte (2009) discuss Agamben's post-juridical politics but do not, however, analyze the status of the paradox in it.

> separating line, and that our only option is to learn to inhabit the threshold, in between whatever division may come our way. [...] On the face of it, Agamben *asks us to live a paradox*, as opposing forces demand to take possession of our thoughts and actions, without ever resolving the matter in either direction. It seems that we can live, like Humpty Dumpty, only on the narrow wall that separates two established realms, though it is important to remember that, at least in Lewis Carroll's version, Humpty Dumpty neither falls nor cracks. (Kishik, 2012, p. 68, my emphasis.)

The scholar, including the scholar of law, is always "stupid," as Agamben claims in his note on the etymological connection between study and stupefying,[53] stupefied by the explosion of the rule that does not destroy the options of its correct following, but rather makes manifest the ultimate groundlessness of each choice among the alternatives, of each drawing of a distinction. The study is, in Thomas Carl Wall's words, "for a paralyzed moment, purely exposed to all its possibilities (all its predicates), it is undestined to any one or any set of them" (Wall, 1999, p. 152). Against the operation of the law Agamben sets its study, which arrests it. In place of the time of the operation, it opens another time that is "in effect, [...] per se interminable. [N]ot only can a study [not] have a rightful end, [it] does not even desire one" (Agamben, 1995, p. 64). The study of law is what resists within the law its smooth operation and the attempts at making its inconsistency invisible, opening the law as an inconsistent totality in all its potentiality, with no single, necessary solutions and destinies to offer.

Yet, Agamben's account of the study of law remains rather suggestive. What would a political practice be that only and eternally studied law, without ever making any impossible decisions in the conditions of undecidability? What is the new use of a law that indefinitely only remains in the state of suspension, stupefied by the explosion? What Agamben calls "the form-of-life," "life that cannot be separated from its form" (Agamben, 2000, p. 2), seeks to answer this question. It is life that resists its capture within the destinies designed for it by the numerous apparatuses, in particular the sovereign-legal one, so that it can take whatever form simply in and through living. In *The Highest Poverty*, Agamben argues on the basis of his investigations into the Franciscan monastic order, that the Franciscans exemplified such a post-juridical form-of-life. By renouncing all forms of ownership, they resisted the capture of their life by both canonic and civil law that simply could not understand the affirmation of non-ownership. The Franciscans lived in a "real state of exception" insofar as they resisted their capture by all forms of authoritative law in order to dedicate their life to Christ and to mere use of things that, for Franciscans, did not constitute a form of property. The normativity that regulated their life was not imposed on them, but rather arose from their life together: "The form [of their life] is not a norm imposed on life, but a living that in following the life of Christ gives itself and makes itself a form"

[53] "It goes back to a st- or sp- root indicating a crash, the shock of impact. Studying and stupefying are in this sense akin: those who study are in the situation of people who have received a shock and are stupefied by what has struck them, unable to grasp it and at the same time powerless to leave hold. The scholar, that is, is always 'stupid'." (Agamben, 1995, p. 64)

(Agamben, 2013b, p. 105). It is not that the Franciscan monastic order lacks normativity — it is normative to the smallest detail — but, Agamben argues, the norm is not an external one imposed from the outside, thereby separating the life from the form that it has, but rather the norm emerges from the very living itself and is immanent to it:

> A form of life would thus be the collection of constitutive rules that define it. But can one say in this sense that the monk, like the pawn in chess, is defined by the sum of the prescriptions according to which he lives? Could one not rather say with greater truth exactly the opposite, that it is the monk's form of life that creates his rules? Perhaps both theses are true, on the condition that we specify that rules and life enter here into a zone of indifference[.] (Agamben, 2013b, p. 71)

On Agamben's reading, the Rule of St Francis turns the life of Jesus into the foundation for a form of "bare life" that manages to escape being captured by every form of sovereign power (Vatter, 2018, p. 238). For Agamben, then, "Franciscanism can be defined — and in this consists its novelty, even today unthought, and in the present conditions of society, totally unthinkable — as *the attempt to realize a human life and practice absolutely outside the determinations of the law*" (Agamben, 2013b, p. 110, original emphasis). "The *abdicatio omnis iuris,*" living beyond the law, is, for Agamben, the Franciscan legacy "that modernity is unable even to think. (*We moderns are such prisoners of law that we think everything can be legislated without limit*)" (Agamben, 2019, p. 30, my emphasis; see also Agamben, 2013b, p. 110).

To conclude, for Agamben, the paradox of law receives a nihilistic expression in the modern biopolitical apparatus the functioning of which must be arrested by messianic politics, that is, politics that puts law in its contemporary manifestation to an end. The paradoxical relation between life and law cannot find thematization in modern law in any other way than as the sovereign exception. Normativity is forced to take the form of biopolitical rule. Post-juridical politics seems to be, for Agamben, a way to "liberate" the phenomenon of human normativity to its proper impotentiality, that is, to let human life take whatever (normative) forms it may take, without being destined to actualize the tasks imposed on it by a law from the outside.

In Chapter 6, we will analyze Hans Lindahl's theory of law that, by making a different diagnosis of modern nihilism, suggests that something like studying the law may be possible within modern law, that non-nihilistic politics in this "paradox-saving" way may be possible within it, and the legal authority might be not simply the operator of the law but also the one who is constantly "stupefied" to study it. Before going to Lindahl's account, we will in the next chapter look at another post-juridical political theorist, Alain Badiou, and explore the alternative metalogical choice, the *consistent but incomplete totality*, and its implications for law, politics and paradox.

5. On the diagonal: Badiou's generic orientation to paradox

5.1 Introduction

In the previous three chapters, we have discussed three very different thinkers of law (and politics), Kelsen, Luhmann and Agamben, who, despite their substantial differences, all recognize, explicitly or implicitly and somewhat reluctantly, that the legal system is constitutively inconsistent. All remark, in very different ways, that consistency is a very important value for the legal system to seek to realize. For Kelsen, the very legality of norms and norm-positing acts depends on the possibility of legal cognition to secure their ground in other norms, and in this way seek to show that law is consistent and rational. Ultimately, the consistency of the legal system rests on a juridical fiction of the basic norm, which is unable to solve the inconsistency in any ultimate sense. For Luhmann, the demand for consistency arises from the preconditions of communication: for something to count as a communication, it needs to link to prior communication and respect its structural requirements (redundancy). Confronted with the question concerning the consistency of its code legal/illegal, systemic communication will seek to find ways not to confront the inconsistency directly by drawing new distinctions, such as externalizing the origin of legal norms to the political system or by developing new programs with which to keep applying the code in a new manner. For Agamben, the inconsistency of modern law is about its being dependent on ultimately political, non-legal or anomic acts of securing a state of normalcy in which it can operate, which also implies the constitutive significance for law of its own suspension. On the one hand, the inconsistency of the law-sovereign apparatus enables the non-mediated governmental power targeted at human life, and, on the other, the existence of law despite its suspension allows for the juridical fiction of the sovereign as a guardian of the constitution and the commonwealth as a whole. This fiction gives the nihilistic apparatus an aura of legal consistency. In all these three accounts, legal consistency is something important for law, or for the law-sovereign compound, but it is also something "fictive" and, at least for Luhmann, something for which the system needs to constantly struggle. Law's constitutive paradox thus is a motor that drives the operation and "evolution" of the system. Modern law is, in all these accounts, self-referential, which implies its inconsistency, as self-reference necessarily implies the inclosure paradox, that the systemic limit both belongs and does not belong to it.

In this chapter, we will investigate Alan Badiou's account of politics and how the figure of the paradox appears in it. We will see that for Badiou, consistency is a concept that characterizes *ontology*, within which the "world of law" also theoretically belongs and which is, according to Badiou, best analyzed by set theoretical mathematics. I have no ambitions to present an original reading of Badiou, but I will

discuss his work relying on Livingston's characterization of it as the "generic orientation to paradox" that is based on the metalogical choice in favor of consistent, but incomplete, totality, instead of inconsistent totality that characterizes *grosso modo* the positions we have discussed until now (although categorization is rather complicated, as we have seen).

It will be my modest suggestion that from the narrow perspective of the *legal totality*, this metalogical choice is also the problem of Badiou's theory. He magisterially presents a theory of politics that transgresses ontology (and law) and gives a detailed account of "truth" that breaks with "constructivism" that, as we remember, is how Luhmann presents his epistemology. Here it must be noted that whereas Luhmann seeks to make the distinction between ontology, which he deems obsolete, and epistemology, which is, for him, the modern *logos par excellence*, Badiou equates ontology and constructivism, while seeking to think "the truth" that is irreducible to them. But this seems to come at a cost of going back to "old" legal theory, in which the legal order *does not self-referentially* (and inconsistently) decide its own limits. For example, in the natural law theory, the system of human, positive law does not itself decide its own limits, but is rather ultimately dependent on the metalanguage of natural law, which functions as its ground and secures its consistency. As we will see, set theory *axiomatically* forbids self-reference, and if law is situated on the plane of ontology the structure of which is analyzed by mathematics, then the self-reference and the claim to autonomy of modern law falls out of the theoretical picture. For this reason, Badiou's political theory is, relatively straightforwardly, post-juridical, although in a different sense than Agamben's messianic politics is post-juridical. To be sure, it is a metalogical possibility to regard the legal totality as consistent, but it arguably is implausible as a description of modern legal systems. Their self-referential operation, the claim of modern legal systems to autonomously draw the distinction between law and non-law, seems difficult to deny.

However, for the sake of our chosen heuristics of the metalogical dualism and the different orientations to totality it gives rise, we will now enter Badiou's political theory and seek to pinpoint the site of paradox in his theory. For although mathematical ontology axiomatically forbids paradox, what Badiou calls "the event" brings the paradox into focus. I rely in my presentation of Badiou's thinking on his work *Being and Event* (1988) with only additional references to his other work. This is mostly for reasons of convenience, as Badiou's thought is extraordinarily complex, but also because his recent major work, *Logics of Worlds* (2006)[54] arguably preserves the basic structure of his argument with modifications that do not need to concern us in the light of the relatively narrow focus of this chapter.

Following the title of *Being and Event*, I begin by presenting Badiou's "metaontology" of Being, his philosophy of ontology. For Badiou, ontology, the study of "Being as Being," is the task of mathematics and set theory. Ontology is thus not as such philosophy but science. Philosophy of ontology is, then, "metaontology," the observation of mathematical ontology at a meta- or second order level. After the

[54] The third part of the *Being and Event* series, *L'Immanence des vérités. L'Être et l'Événement* 3 was published in 2018.

discussion of "Being," I work my way toward Badiou's theory of the "Event." I end by drawing some implications to legal theory, making some comparisons to the paradoxico-critical orientations and presenting some critical comments from the perspective of the alternative metalogical choice.

5.2 "The one is not": Badiou's metaontology

Let us begin with Badiou's metaontology. His philosophy of ontology is, as mentioned, a philosophical account of contemporary set theory mathematics. "[I]nsofar as being, *qua* being," he writes, "is nothing other than pure multiplicity, it is legitimate to say that ontology, the science of being *qua* being, is nothing other than mathematics itself" (Badiou, 2006a p.xiii). Badiou uses the standard systematized set theory, the one based on Zermelo-Fraenkel Axioms plus the Axiom of Choice (ZFC). Set theory, Badiou argues, gives a formal account of what *is*, of Being-*qua*-Being, of Being *as such* of beings, in exclusion to all other qualities (such as being red, round and weighing 200 grams) that beings (such as an apple) may have.

Post-Cantorian ZFC set theory formulates axioms the purpose of which is precisely to free set theory from paradoxes such as the Russell paradox (the paradox of the set of all non-self-membered sets that both belongs and does not belong to itself). Accordingly, for Badiou, ontology is axiomatically *consistent*. Consistency is, in a sense, its highest value. In Livingston's argument that we have been following, Badiou is committed to the metalogical choice in favor of consistency and incompleteness over completeness and inconsistency. We will see that this choice has profound implications for the Badiouan understanding of the nature of (legal) structures that regulate what exists by providing a *consistent* account of "inconsistent multiplicity" as *one*, and of the nature of genuine politics that presents what "in-consists," what breaks incongruently with the ontological unity, supplementing and complementing it with a "truth" that remains absolutely indiscernible and unnamable within the consistent positive "one." The "event," we will see, shows the *incompleteness* of any existing consistent count-as-one of inconsistent multiplicity.

Let me take this gradually, explaining "inconsistent multiplicity," "consistent one" and the "inconsistent event" all in their turn. First, let us look at the reasons behind Badiou's metalogical choice. His metaontology is based on the impossibility of what he calls "the Whole" or "Universe," the consistent *and* complete universal set of all sets (Badiou, 2009, pp. 109-111; Badiou, 2006a, pp. 40-41). Such a universal set cannot exist, because, as we saw in the Introduction (1.3.2), it leads to paradox and inconsistency. Furthermore, Cantor's power set theorem showed that infinities have different cardinalities ("sizes") such that for every infinite set, we can construct its infinite power set (re-grouping all its original subsets) the size of which is greater than the infinity of the original set. There can thus be no "final" infinity that would englobe all other infinities, because for every infinite set, it is possible to construct a still

"larger" power set, a yet "bigger" infinity. Sergei Prozorov puts it well when he explains that:

> [a]s soon as we posit the existence of the world as the whole, it is possible to construct a power set of this world, which will be immeasurably greater than it, leaving an excess that cannot be incorporated into it. The same procedure can then be applied to this power set and so on to infinity. There is thus no such thing as "the absolutely infinite Infinity, the infinity of all intrinsically thinkable infinities." *The world as the whole is never all there is*: there always remains an excess that cannot be subsumed under this totality, which is thus forever resigned to being limited, partial and particular, irrespective of how it is defined. (Prozorov, 2013a, pp. 47-48, citing Badiou, 2006a, p. 277, original emphasis.)

For Badiou, then, "*there is no* Whole" (Badiou, 2009, p. 102). From the Badiouan perspective, there cannot be a totality of everything, but every positive world there is (such as the world of the French State, the world of a school, the world of a legal court, the word of international relations, the world of our home…), is a particular and finite world that always leaves an excess that it cannot totalize. Badiou's starting point will thus be the impossibility of the Universe as a single positive, consistent and complete world that encompasses everything. "There is no passage from any particular world, however diverse and inclusive, towards universality" in the sense of a positively existing Universe (Prozorov, 2013a, p. 61). As we will see in the next chapter, Lindahl also argues for the impossibility of a Universal World of full inclusion but makes a different metalogical choice with different implications. A complete and consistent Universe with no outside cannot exist; on this point paradoxico-criticism and generic orientation agree.

Thus, "the one *is not*" is the famous statement that opens Badiou's metaontology, that is, philosophy that takes set theory as its condition (Badiou, 2006a, p. 23). In Badiou's understanding, as Peter Hallward explains, "if the one is not, only what is not one, or multiple, can be" (Hallward, 2003, p. 62). If One consistent World is an impossible being, there must always be more than one world; in fact, an infinite number of worlds (Badiou, 2009, pp. 114-115). As there cannot be a consistent, comprehensive Totality of everything that is, being as such must be both multiple and inconsistent. "[B]eing, thought in its very being (the "being-ness" of being, or being *qua* being), is nothing other than inconsistent multiplicity" (Ling, 2010, p. 49). This decision to treat being as multiple has the implication that all "presentations" and "representations" of being, that is, all positive situations, worlds and systems, can be seen as *posterior* to the being of inconsistent multiplicity as, precisely, its consistent presentations and representations.

So, one *is not*, but there is an *operation of "count-as-one"* (Badiou, 2006a, p. 24). All unity there is, is *an effect* of the operation of counting the multiple as one. Whatever exists, exists as counted-as-one, or as Badiou also puts it, as *belonging to a situation*. For Badiou, "[a]ll thought supposes a situation, a structure, a counting-for-

one, whereby the presented multiple is consistent, numerable" (Badiou, 2006a, p. 44). "A situation" can be understood as a presented set of the members it counts-as-one. A set is, as we noted in the Introduction, "any many which can be thought of as one" (Cantor, 1980, p. 204, note 1). Burhanuddin Baki offers a more technical definition of the set as:

> a simple multiple of objects taken as a single entity, or a single entity understood as a simple multiplicity of objects. We immediately observe that every existent entity is a set, and that every entity exists in the form-multiple of a set. Everything is a collection and everything is collected into something else. *To be is to be a set*. (Baki, 2015, pp. 36-37, my emphasis.)

To think in terms of sets, is to think of each being as a member of some set, counted in some collection, and as itself also forming a set. For example, the things at my table (the computer, the two books, the pile of paper) consist as a set (with four members), and each of the thing-members can in turn be thought as a set (the computer consists of its parts, the books of their pages, the pile of paper of sheets of paper). We can retain from this, on the one hand, *multiplicity* or "manyness" that is, on the other, considered as a *unity*. Set theory or ontology is the study of how the many can be regarded as a unity.

Badiou's metaontology decides to theorize, on grounds of axiomatic set theory that interdicts inconsistency and works to preserve consistency, Being-*qua*-Being in the formal language of multiples and sets or situations. A situation is any *structured presentation of multiplicity* (Badiou, 2006a, p. 24). As Peter Hallward explains: "Structured means to be presented according to a consistent process of one-ification, a coherent counting as one" (Hallward, 2003, p. 64). Neither the Universe nor inconsistent multiplicity can be presented, because both are, precisely, inconsistent: what is presented (or in Badiou's later terms, "appears") as belonging to a situation, is always multiplicity consistently (without contradictions and paradoxes) counted-as-one. "Inconsistent multiplicity" thus means here not a paradoxical multiplicity, but rather formless or structureless multiplicity that cannot as such be grasped ("presented"), because of its lack of structure. Nothing can be, in fact, said of it directly. Inconsistent multiplicity is only given form in the operation of count-as-one. Situations thus have no "ground in being," because they are counts-as-one of structureless multiplicity: they are only effects of counting this multiplicity as one, forming it into consistent multiples, sets with members. Inconsistent multiplicity becomes organized membership of a plurality of elements in a situation thanks to the operation that counts, gathers, them together.

"Nothing can be presented that is not presented as one. And conversely, whatever is thus presented as one — whatever can thus be counted as one — shows itself for that very reason to be not one, that is, multiple. The one is not, precisely because ones, unifications, come to be as *results*" (Hallward, 2003, p. 63). Situations contain the multiple they count as their elements or members that then "consist" together as one. There are, in other words, *no doubts* as to what belongs to a set: the

count-as-one picks out all and only the members for its domain of operation, all and only those elements that satisfy the law of belonging of the set in question. We can thus understand *consistency* here 1. as lack of contradictions and paradoxes and 2. as belonging to a set, consisting together of elements as members of a set (see Baki, 2015, pp. 55-57). Being is presented, in Badiou's metaontology, as an infinite multiplicity of consistent multiples, "collectives" that consist of their lawful members.

Here then is the complex core of Badiou's metaontology. On the one hand, the inconsistent multiplicity is what is counted-as-one and made consistent, and it is the "formless," structureless multiple and *not* the consistent one that exists. On the other hand, the multiple can only be ontologically conceived as counted-as-one, as consistent instead of inconsistent. "The crucial ontological distinction is then found at the level of the situation's being: the pure being of the situation — the 'before of the count' — remains beyond the situation itself, inasmuch as its being is uncounted multiplicity" (Ling, 2010, p. 50). The situation, the set, can be understood ("indexically," one might say) as "the place of the taking place" of Being as consistent (Badiou, 2006a, p. 24). When seen as if through the eyes of an inhabitant of this taking-place, from within the immanence of the opening of the situation:

> a situation is not such that the thesis 'the one is not' can be presented therein. On the contrary, because the law is the count-as-one, nothing is presented in a situation which is not counted: the situation envelops existence with the one. *Nothing is presentable in a situation otherwise than under the effect of structure*, that is, under the form of the one and its composition in consistent multiplicities. (Badiou, 2006a, p. 52, my emphasis.)

All that counts within the situation and for its inhabitant is what the law of the count-as-one allows one to see. For the inhabitant, the difference between the consistent count-as-one and inconsistent multiplicity remains completely in obscurity: a situation "necessarily *identifies being with what is presentable*, thus with the possibility of the one" (Badiou, 2006a, p. 52, my emphasis). It is the necessary closure that makes a certain opening, a certain horizon of "veridicity" and knowledge of beings possible (see Badiou, 2006a, p. 331), but within which the closure itself, and thus its difference from inconsistent multiplicity, remains strictly unknowable, beyond the situation-immanent discourse of verifiability and falsifiability. Nothing is knowable within a situation except what its categories and language, with which the count-as-one is established, allow.

Note how the Badiouan situation resembles Luhmann's epistemological constructivism. Indeed, as we will soon see, it is precisely the mathematical constructivism from which Luhmann borrows the name of his own position that Badiou critically targets in his political theory. Luhmann's gesture of abandoning all "ontology" (that is, all significance of the reality that remains unknown) in favor of system-specific epistemology corresponds to Badiou's account of the situation in which being is identified with what is verifiable according to the rules of belonging to that situation. In both, the difference between what appears to the inhabitant of the

situation/system and the limited situation/system itself remains in obscurity. For Badiou, pure inconsistent multiplicity is, then, from the perspective of the ontology of situated Being, inexistent and therefore "nothing." For Badiou, "ontology [...] is a situation," and "there is nothing apart from situations" (Badiou, 2006a, p. 25).

And yet, Badiou states that "the one *is not*." A situation is a structured *presentation* of the multiple. The multiple is prior to its presentations; it is what is being presented as one and thus *different from it*. Retroactively, Badiou suggests, that is, only indirectly, looking back from the situation in which the multiple appears as one, i.e. in which multiplicity is already worked over by the operation of count-as-one, can we understand inconsistent multiplicity as "subtracting" itself from all figures of the one, as the inconsistent that what now appears as consistently presented. "What will have been counted as one, on the basis of not having been one, turns out to be multiple" (Badiou, 2006a, pp. 24-25). Nothing can be directly known in ontology of inconsistent multiplicity, because all that can be known to be is multiplicity made consistent in the operation of the count-as-one.

5.3 The decision and the name of the void

An indirect approach is, thus, necessary to mark the place of "the nothing" in ontology and to formulate the proposition "the one is not." Badiou uses here a proof technique known as "consistency proof" which can establish not "absolute" proof of consistency of a proposition but only its "relative" consistency. This is related to Badiou's metalogical choice, so let us try to understand what relative consistency means intuitively (for the technical exposition see Baki 2015, p. 55-56, 84-85). If direct proof of consistency advances from premises known to be true to a true conclusion, relative consistency must do without such direct deduction. It must begin with an *ungrounded decision* instead, a decision to consider the given proposition as not leading to a contradiction with its premises, provided that those premises themselves are consistent. Only then the proof advances to the "truth procedure" to work through the details of showing that, given consistent premises suitably interpreted, the new supplementary proposition is consistent with them as well. As Baki explains:

> [such] validation of the propositions does not precede but comes after the decision. Badiou commits to the "conclusion" [the one is not; mathematics is ontology; HL], and then follows through with "justifying" and explicating them. This justification-to-come is precisely what he means by fidelity [*fidélité*] to the decision via the faithful sequence of truth procedures. (Baki, 2015, p. 85)

The decision, in a situation of undecidability, to consider a proposition consistent opens a *task* of proving its consistency. Such a task requires what Badiou calls "the faithful subject": the one who carries out the process of constructing the proof, who "forces" such a world into being in which the proposition can be shown to

be consistent. For Badiou, the subject does not precede the decision, but rather emerges as its effect: "decisions (nominations, axioms) suppose no subject, since there is no subject other than as the effect of such decisions" (Badiou, 1991, cited in English in Hallward, 2003, p. 105). The temporality of the *future anterior* ("the justification-to-come") characterizes the truth procedure: the opening decision *will have been shown* consistent (and the subject faithful) at "the end" of what is an endless, infinite process of forcing. We return to this.

It seems to me that what here is called the consistency proof is precisely what is at stake in what we have been calling the temporal paradox, the paradox of retroactivity, and that can be extracted from Luhmann's account of the invisibilization of the paradox, and even read into Kelsen's theory of the basic norm. It also informs Lindahl's paradoxes of representation and authority, as we will see in the next chapter. What is common to all these very different expressions of the temporal paradox is the *non-derivable decision* that claims to be consistent/representative/legal in conditions in which its consistency/representativity/legality cannot be directly shown. The decision is necessary to open the horizon of its own validation as a consistent/representative/legal decision within which it already at the moment of pronouncing includes itself.

Badiou thus makes a theory-opening metalogical decision to treat situations as consistent and what "subtracts" from them as the inconsistent multiplicity. It is this subtracted multiplicity that will later show the incompleteness of situations. As said, that being as inconsistent multiplicity cannot be known in ontology means that, from the point of view of knowledge, it is indeed nothing. But the count-as-one can be seen as a result of an operation that has "targeted" the pure multiplicity existing prior to such an operation, excluding it as inconsistent and including it as consistent: "although there is never anything other — in a situation — *than* the result (everything, in the situation, is counted), what thereby results marks out, before the operation, a must-be-counted" (Badiou, 2006a, p. 53). For this reason, even if what exists is always presented and consistent insofar as it is made knowable, the unknowable pure multiplicity is not mere non-being. To assert that it is would imply that everything that is, is simply consistent multiplicity: being would be equal to structure (see Baki, 2015, p. 88). This would lead us to radical structuralism and precisely to the kind of nihilist constructivism that we discussed in the previous chapter. We will see that Badiou can be seen to provide a re-appreciation of the *nihil*, of the reality that in modernity sinks, according to Luhmann, to nothing and becomes simply the environment of a system.

So, in Badiou's "realism," inconsistent multiplicity is a remainder, an excess subtracted and withdrawn from all figures of the one. To emphasize this not-mere-non-being of what within the situation's horizon of veridicity is always simply nothing, Badiou *decides* that "(the) nothing is" (Badiou, 2006a, p. 36). Part of this decision is to give an ontological name to "the nothing" so that it would register within ontology (i.e. set theory). This name is *the void,* or the empty set, marked as ∅ (or { }). For Badiou, "every structured presentation unpresents 'its' void, in the mode of this non-one which is merely the subtractive face of the count" (Badiou, 2006a, p. 55). Being-*qua*-Being is the subtractive face of every count-as-one, and for this reason it is

absolutely a-specific and *generic*, withdrawing from all its presentations, although "situated" in each of them as what is "unpresented" in them, and irreducible to any of them. The inconsistent multiplicity "allows, within the retroaction of the count, a kind of inert irreducibility of the presented-multiple to appear, an irreducibility of the domain of the presented-multiple for which the operation of the count occurs" (Badiou, 2006a, p. 28). The empty set is this appearance of the "negative underside" of presentation, of its subtractive face, the name that presents, as "the proper name of being," what within ontology can be presented of the unpresentable. The empty set is the name of the reality that remains unknown.

See how Badiou describes this decision of naming the nothing:

> Naturally, because the void is indiscernible [unknowable in ontology; HL] as a term (because it is not-one), its inaugural appearance is a pure act of nomination. This name cannot be specific; it cannot place the void under anything that would subsume it — this would be to reestablish the one. The name cannot indicate that the void is this or that. The act of nomination, being a-specific, consumes itself, indicating nothing other than the unpresent-able as such. In ontology, however, the unpresentable occurs within a presentative forcing which disposes it as the nothing from which every-thing proceeds. The consequence is that the name of the void is a pure *proper name*, which indicates itself, which does not bestow any index of difference within what it refers to, and which auto-declares itself in the form of the multiple, despite there being *nothing* which is numbered by it.
>
> Ontology commences, ineluctably, once the legislative Ideas of the multiple are unfolded, by the pure utterance of the arbitrariness of a proper name. This name, this sign, indexed to the void, is, in a sense that will always remain enigmatic, the proper name of being. (Badiou, 2006a, p. 59)

What we can retain from this is that to give the name *void* to Being-qua-Being is to posit an ungrounded axiom, the Axiom of the Void, "a pure proper name" of what founds presentation. It is the name of that which every presentation presents but in the mode of unpresenting. "The set ∅ is not precisely the nothing," as Baki explains, because it is the *proper name* of the nothing, and the name is not identical to what it names. It is "rather the presentative suture to the nothing. The void is the localization, with respect to the situation, of nothingness as a multiple" (Baki, 2015, p. 101). The void set as the "proper name of being" is the first name that ontology must posit in order to be able to constitute itself as the formal language of Being-qua-Being. Because inconsistent multiplicity is unnameable as such, the proper name of being must be that of a compositionally consistent multiple, that is, a set, but a set that contains, precisely, nothing.

The name *void*, as Badiou says, simply indicates that what every set is "about": presenting the multiple that subtracts from every presentation of it. It names the Being-qua-Being as such within ontology, that bare "there is…" that subtracts itself from every presentation and that itself is no particular being. We can thus immediately

see that this "auto-declaration," this "pure utterance of the arbitrariness of a proper name" that "commences ontology" is *itself ontologically "illegal,"* because all self-reference is axiomatically forbidden *within* ontology. As Livingston puts it:

> [i]n this way the power of auto-nomination to call forth existent sets, though explicitly prohibited within ontology by its fundamental axioms, nevertheless proves essential in grounding its most basic presupposition, the presupposition of a "there is…" of being prior to any determinate set or property. (Livingston, 2012, p. 48)

Axioms that forbid self-reference and paradox *within* ontology nevertheless themselves require a paradoxical auto-declaration in order to be established. The interdiction of self-reference is itself an axiom (the Axiom of Foundation), a non-derivable decision the consistency of which itself cannot be shown in any direct way. The axioms of set theory cannot themselves be proven in the theory, but they are decisions that *will have been shown* consistent when the faithful Subject constructs the theory itself as a whole in the infinite truth procedure that is the very development of set theory mathematics. The appearance of the laws of ontology (set theory) itself is, indeed, an example of what Badiou calls *the event*: that what breaks with the laws of ontology. In direct homology to this truth procedure in science, also politics is, for Badiou, precisely a process, inaugurated by "an event" and an ungrounded decision, and taken further by the faithful political subject. For Badiou, "truth procedure" happens in four, and only four, guises: as science, art, love and politics (see Badiou, 2008a). The paradox is *only* characteristic of the emergence of a truth procedure, and it does not characterize what the procedure establishes: for example, within the science of set theory, the sets themselves. These form the logical structure of all ontological totalities, such as the world of law, which are consistent and free of paradox and self-reference.

Being itself is, thus, not mathematical, nor are beings, like apples, buildings and humans, mathematical objectivities. Rather, mathematics provides, according to Badiou, a language in which to talk about Being in a consistent manner. Furthermore, philosophy as metaontology is the locus for thinking about the meaning of mathematics as ontology (Meillassoux, 2012, p. 2), and as a meta-perspective, philosophy sees what mathematicians cannot see. It can thus see beyond the mathematical structures of Being-qua-Being and thereby also that structure does not saturate all what is. As Baki puts it: "Badiou's thesis does not say that Being is essentially structure" (Baki, 2015, p. 23). This is the point of anti-constructivism (and anti-nihilism), put in the language of *The Logics of Worlds*: there are *only* structures, "languages," that regulate how the multiple, "the bodies," may "appear" within "the world" to which they belong — "*except that there are truths*" (Badiou, 2009, p. 4, my emphasis). That set theory is axiomatic, that is, based on "truths," constitutive decisions that cannot be themselves proved within the theory they ground, shows that mathematical unities, sets, presentations and worlds, themselves are not but are "merely" figures of the operation of one-ification. Such operations are targeted on pure

multiplicity of which nothing else can be said in ontology except give it the name "void."

5.4 The metalogical dualism

We can now begin to see Badiou's metalogical choice that we will continue to elaborate: his preference for consistency and incompleteness over inconsistency and completeness. By thinking about the count-as-one as both a consistent presentation of the multiple and as a mere operation on inconsistent multiplicity, Badiou rejects the idea of a completed totality. There is always an excess of inconsistent multiplicity that counts as nothing within the lawful situation. This excess accounts for the possibility of the Event and the Truth, that is, the apparition of something that the situation cannot consistently present and that comes to supplement its consistent depiction of being.

That inconsistent multiplicity is unknowable and unprovable makes of Badiou's decision to treat it as such a pure decision. Furthermore, he wants to have a theory that can preserve the primacy of the inconsistent multiple and not to theorize Being-*qua*-Being as One. Ontology as a discourse of Being-*qua*-Being must itself be a situation "haunted" by inconsistency. It is a kind of second-order count-as-one that can never grasp all there is as a single totality. "If there cannot be a presentation of [B]eing because [B]eing occurs in every presentation – and this is why it does not present itself – then there is one solution left for us: that the ontological situation be the presentation of presentation" (Badiou, 2006a, p. 27). For Badiou, ZFC set theory is uniquely capable of providing such a second-order presentation. First, ZFC provides an understanding of pure sets that contain nothing but other sets that themselves contain nothing but, ultimately, the empty set (set without members); in other words, it provides an understanding of pure multiplicity without any particular meaningful figure of the one. It does not need to define what exactly sets contain but can work with, precisely, the nothing as multiplicity. Moreover, it can do so consistently, by providing rules for the manipulation of sets. It will provide a consistent presentation of consistent presentation. But this second-order consistency, that of ZFC itself, is unprovable by the theory's own lights. Recall here our discussion on Gödel's Incompleteness Theorems. The choice of this language is a decision, as, due to the Second Incompleteness Theorem, ZFC is unable to prove its own consistency. The consistency of ZFC is then first a decision, an axiom, before it can become an established situation (Baki, 2015, p. 92). The ontological work that is done presupposes its own consistency in order to be able to operate:

> Badiou has axiomatically decided the paradoxes as resolved, and nothing in ontology can argue against this because ZFC cannot prove anything about its own consistency or inconsistency. To simply commit that his ontology is paradox-free is enough for it to be paradox-free, so long as one follows through

> with the aftermath of the commitment without necessarily justifying or proving it. (Baki, 2015, p. 94)

The perhaps surprising outcome of these observations is that the *ontological* primacy of inconsistent ("one-free") multiplicity can be maintained when *metalogical* primacy is given to consistency rather than to inconsistency. This is not a paradox, but a description of one of the hands of deciding the undecidability that Livingston diagnoses, that the Sovereign One can be metalogically split either into consistent incompleteness, which leads to ontological primacy of the inconsistent multiple, and inconsistent completeness, which leads to the ontological primacy of the inconsistent one. That both orientations see inconsistency as ontologically primary, grounds their joint rejection of the comprehensive and consistent Universe.

The paradox and inconsistency are eminently important for Badiou's theory as they expose the limits of ontology and what can consistently be known and open the door to what exceeds those limits. The Badiouan subject "moves through" the paradox of self-reference, as we will see, because every Truth that an extant situation cannot prove must by definition be inconsistent in the situation in which it is asserted. Consistency proof will require a faithful subject that commits to showing the consistency of a Truth that cannot, for now, be seen to be such. Both the auto-nomination of the void as the final ground of being and the forcing of "the event" by a "faithful subject" in a situation in which it is otherwise indiscernible and unnamable are exceptions to the laws of ontology. Both are pure decisions in a situation of undecidability, in a situation that is incomplete as it cannot provide proof to a Truth that can nevertheless be thought about and can be worked "into" the situation by the Subject.

Livingston argues that Badiou does not, however, explicitly acknowledge the existence of the metalogical choice that the impossibility of the consistent and complete Whole implies. Badiou takes the choice to rather simply be between the classical metaphysical terms: the one and the many. In other words, he does not really recognize, or so Livingston claims, the existence of the paradoxico-critical orientation to paradox. For Livingston (see also Introduction):

> the effect of Russell's paradox and related semantic paradoxes is not in fact to demand or even suggest such a simple decision between 'the One' and 'the Many' of traditional thought; it is, rather, effectively to *disjoin* the sovereign One into the two aspects of consistency and completeness and demand a decision between the two: *either* consistency with incompleteness (Badiou's decision) *or* completeness and totality with fundamental contradictions and paradoxes attaching to the limits of thought and signification [paradoxico-critical decision]. (Livingston, 2012, p. 187)

From this angle, the undecidability is not exactly between the One and the Many. Insofar as the Whole is paradoxical, it is not undecidable that consistent and complete universal set does not exist. Undecidability emerges rather between 1. the

consistent one from which the inconsistent is subtracted as the void that can form the site of the event of Truth, which complements the situation that is thereby seen as incomplete; and 2. the inconsistent one that is thrown to deal with its paradoxical structure of being inside and outside of itself. A decision either way will open a theoretical horizon with its distinctive features.

If the one is consistent and incomplete, as we have now decided to look at it, we can formulate, with Badiou, the relation between the one and the many as the consistent operation of one-ification targeted at the inconsistent many. This is an operation of forming multiplicity into consistent totalities within which knowledge and correct (or in Badiou's terms "veridical") or incorrect judgments are possible. That the many is always subtracted from such results of totalization shows, at least in the case of historical totalizations, the contingency and transformability of all figures of the one. There are always Truths that remain unknowable within given totalities, and the emergence of a new Truth shows the incompleteness of the contingent totality that it ruptures.

5.5 The Axiom of Foundation

We can try to further understand the meaning of the void set with the help of another law of ontology, that of the Axiom of Foundation. In ZFC set theory in which self-referential sets are axiomatically forbidden as a result of the Russell paradox, the Axiom of Foundation states that all sets must be founded on other elements already there, that is, on other sets than themselves. "As a general rule," Badiou explains, "the being of a multiple is thought on the basis of an operation which indicates how its elements originate from another being, whose determination is already effective" (Badiou, 2009, pp. 111-112). The Axiom of Foundation forbids the self-foundation of sets. Sets ought not be the foundational element of themselves. This Axiom "is the ontological proposition which states that every existent multiple — besides the name of the void — occurs according to an immanent origin, *positioned by the Others which belong to it*" (Badiou, 2006a, p. 187, my emphasis). The foundational element, "the Other" within the situation, "establishes a kind of original finitude" of the situation (Badiou, 2006a, p. 186). Hallward gives a "metamathematical," but illuminative, example of the foundational element: a linguistic situation is based on the existence of a set of phonemes (Hallward, 2003, p. 88). "Mere sounds" are indiscernible as such from the point of view of speaking, because each sound bears meaning according to the "laws" of linguistic expression, but they still form the basis of speaking meaningfully.[55]

[55] Note, here, the similarity to what Agamben calls "the Voice." But note also that whereas for Badiou, the set is grounded on other sets already there, for Agamben, the Voice is the split *within* human speech itself. This is illustrative of the difference between paradoxico-criticism and the generic orientation: whereas sets are founded on a foundational set that does exist as a member of the set it founds, but whose own members are external to the founded set, language is founded on an *internal* split of inclusion-exclusion, it is inconsistently self-founding. For Agamben, it is precisely problematic

Based on the Axiom of Foundation, set theory may then construct hierarchies of sets, each guaranteeing the consistency of others, and the hierarchy is ultimately based on the void set alone. There is no "smallest" indecomposable positive element, no atom that would halt the structure of foundation, but only the void set. Every count-as-one is incomplete in that it is based on an element that belongs to it but of the content of which (of the elements of which) it cannot know anything with its own means of counting. Its operation of the count-as-one is based on a foundational element the elements of which remain beyond this operation. There will then be in every set, in each count-as-one, an element (a set) that has no elements in common with that set it founds. The foundational set belongs to the set it founds, but its own members (should it have any; it can namely also be the void set) do not. Ultimately, the hierarchy of sets and the regressive investigation into the elements of the elements presented in a situation must find a halting point. Given that the one is not, the ultimate halting point can then only be the void set. Note that there is no reflexive, self-referential drawing of the systemic limit, which always implies a certain circularity: determining what belongs to the legal system within that system. For Badiou, "the circularity can be undone, and deployed as a hierarchy or stratification. This [...] is one of the most profound characteristics of this region of thought: it always stratifies successive constructions starting from the point of the void" (Badiou, 2006a, p. 376).

Foundational elements are, from the perspective of the situations they found, "on the edge of the void": the inhabitant of the situation cannot discern whether there are elements in the foundational set, or whether it is an empty set. Within the founded situation, "one cannot think the underside of their [foundational element's] presented-Being (Badiou, 2006a, p. 175). Within the situation, the foundational element, which has its own elements, and the void set cannot be distinguished. Seen from within the immanence of the founded situation, the empty set and the foundational element with its own elements "look" the same: opaque. As Baki explains, "[f]or all practical purposes, they both mark the event horizon surrounding a black hole. The foundational element will be the situation's own name for the void. Every void must be examined with respect to a situation, and every set admits the otherness counted as the edge of the void" (Baki, 2015, p. 100). What founds a situation is then anything that in the situation in question registers as that what looks "indecomposable" (Badiou, 2006a, p. 175), indiscernible and unknowable, and yet as belonging to the situation as its "own void." This highly abstract and technical account of foundation will become significant later, when we see that Badiou projects, very imaginatively, this set theoretical Axiom onto the field of social orders. In every social order, there is an element that "counts as nothing." The dominant understanding holds such an element in no regard. However, it is, crucially, not an empty set but will present itself in an act of politics.

to consider the internal split as consistent, as has been done in the tradition of metaphysics that has sought to "mystify" the Voice precisely as something external that grounds language and that can be forgotten.

The Axiom of Foundation could also be pinpointed as one "site" at which the metalogical preference for consistency and incompleteness over inconsistent totality appears. The foundational element is precisely the "blind spot" that grounds the situation without itself "appearing" in it as what it is. It is the "outer limit" that the inhabitant of the situation cannot see, a structural excess that is uncontrollable from within the situation. Only from a more encompassing perspective does the foundational element come to light, and for Badiou, as we will see in a moment, the event is what emerges from the foundational element, by turning it into an "evental site." An event is something that radically breaks with the Axiom of Foundation and all other laws of ontology. The cut is clear between the situation in which the foundational element counts as nil and the post-evental situation in which it appears "maximally." There emerges a stark opposition between ontology that prohibits reflexivity/self-reference and the evental rupture that is reflexive and self-founding.

5.6 Presentation and representation

Badiou distinguishes further between *presentation* and *representation*. "[A]ll situations are structured twice," he argues (Badiou, 2006a, p. 94). Presentation means that an individual element (that, as we remember, is always a set) is counted as an element, or member, of another, larger set. Representation, for its part, means that an individual element already presented now appears under this or that identity, as represented as this or that. Within any set, the elements of that set can be differently represented by regrouping, "including," them into different subsets called "parts." A representation is always "excrescent," that is, it has more elements than the presented situation. "For instance, the set that contains Alain, Bertrand, and Cantor has just those three elements, but it has eight subsets or parts. The set containing only Alain and Bertrand is one of these parts; another is the set containing only Cantor" (Livingston, 2009, p. 314). What Cantor (the person) named the power set "collects together all the existing subsets of a particular situation, [...] all the possible ways of representing and 'talking' about its elements" (Baki, 2015, p. 110).

Badiou renames the power set, using a deliberately political metaphor, as the "state of a situation" (Badiou, 2006a, p. 95). For him, as Norris notes, "there exists a close structural homology between, on the one hand, such pressing issues of social justice or political representation and, on the other, the sharply distinguished set-theoretical concepts of part and member, belonging and inclusion, or inconsistent and consistent multiplicity" (Norris, 2009, p. 7). The state of the situation, in the context of state politics, is "the bureaucratic apparatus of the state, which is not concerned with individuals *per se* as pure elements but only as *representatives* of groups, be they grouped by class, gender, race, professional occupation, sexual preference or what not" (Prozorov, 2013a, p. 60). The state of the situation forms a larger situation, a *metastructure* that gives an account of the situation itself, of its count-as-one that is the property of membership in it, all the identities and relations that are possible

within a situation with certain members. It is a distribution of specific parts to those counted into a situation. It targets those who are there, attempting to keep away the void, inconsistency and *dé-liaision* (Badiou, 2006a, p. 109). The unbinding of the count-as-one always haunts every presentation, because every situation is incomplete and cannot itself secure its own consistency.

For Badiou, then, "the state is less a result of the consistency of presentation than of the danger of inconsistency" (Badiou, 2006a, p. 109):

> The structure of structure is responsible for establishing, in danger of the void, that it is universally attested that, in the situation, the one is. Its necessity resides entirely in the point that, given that the one is not, *it is only on the basis of its operational character, exhibited by its double, that the one-effect can deploy the guarantee of its own veracity*. This veracity is literally the fictionalizing of the count via the imaginary being conferred upon it by it undergoing, in turn, the operation of a count. (Badiou, 2006a, pp. 94-95, my emphasis.)

> The completeness of the initial one-effect is thus definitely, in turn, counted as one by the state in the form of its effective whole.
>
> The state of a situation is the riposte to the void obtained by the count-as-one of its parts. This riposte is apparently complete, since [...] it generates the One-One by *numbering structural completeness itself*. Thus, for both poles of the danger of the void, the in-existent or inconsistent multiple and the transparent operationality of the one, the state of the situation proposes *a clause of closure and security*, through which the situation consists according to the one. This is certain: the resource of the state alone permits the outright affirmation that, in situations, the one is. (Badiou, 2006a, p. 98, my emphasis.)

To simplify radically: what the state of the situation does is to count-as-one the elements of the situation as subsets but also the situation itself (as a subset of itself). In this way, it also *exhibits the operation of the count-as-one of the prior situation*, which remains obscure from the point of view of the inhabitant of the situation itself. The state of the situation provides, in a sense, a picture of the situation as a count by counting its elements (only normal elements, not its foundational element) a second time and differently, namely as parts. Representation completes presentation, securing it as a one.

Representation, or "fictionalizing," is, for Badiou, a consistent set theoretical operation of inclusion and thus perfectly "legal" (unlike for Lindahl whose paradox of representation we discuss in the next chapter). It is instructive to compare Badiou's state of the situation to Luhmann's re-entry (the logic of which also applies to Lindahl). The latter is a *self-reflexive move* in which the system observes itself and its own distinction from its environment that in mere operation remained a blind spot, thereby displacing its own blind spot *but not effacing it*. The former, by contrast, is a construction of a metastructure, a "larger" situation that includes the "smaller"

situation and complements it by observing it from an outside position as a consistent whole in which every member is at its lawful place and relates to other members in lawful ways. Of course, a yet bigger power set can be constructed, *ad infinitum*, but consistency of the "enclosed" set is confirmed by each completing meta-step. The blind spot that is the very operation of the count-as-one is, in principle, open to visibility from outside.[56]

Badiou can then strictly distinguish between pure belonging to the situation and being included into the state of the situation; between elements and parts. Making these distinctions is not a matter of paradoxical self-identification of a totality. To the contrary, for Badiou, representation is a consistent operation of inclusion of a set by counting its subsets, by establishing relations between members. It is an operation that guarantees for the presentation what it itself cannot: consistent structure of presentation. It is from the outside of a situation unable to prove its own consistency that this incomplete set itself can be shown consistent. Kelsen's idea of legal cognition could be read to fit this definition of representation, if he is read conventionally, as a "constructivist-criteriological" thinker. Scientific legal cognition secures, as a re-count of the set of legal norms, the consistency of the system unable to prove it itself, by determining the possible lawful relations of the elements (norms) to each other. Legal cognition — legal science — exorcizes the ghost of inconsistency (invalidity) from the legal system otherwise haunted by it.

Baki helpfully differentiates between compositional, or semantic, and veridical, or syntactic, consistency. Semantic consistency is about consisting together as one of the elements of a set. If something is a set, it is a consistent count of its elements; a set is defined by its elements. Syntactic consistency is about the logical coherence of an axiomatic system (i.e. it does not involve any paradoxes). Gödel's Completeness Theorem (unlike his *In*completeness Theorem, see Introduction)[57] states that these two forms of consistency coincide. (Baki 2015, pp. 57-58, 121) Baki further explains:

> A presented multiple is consistent not just because it consists together but also because its structure is logically and internally coherent, provided that its horizon of veracity is articulated by some interpretative formalism that is the "fictionalizing" of the first count-as-one [i.e. by a representation, a metastructure; HL]. The veridical statements within a situation do not contradict each other because the domain of the situation constitutes a set. [...] The situation is consistent, but it cannot be verified as such from within its own

[56] Luhmann says, of course, also that "you can see what I cannot see," that my blind spot is visible to an external observer, but nevertheless, for him, this does not prohibit self-reference and dynamic reflexivity.

[57] The implication of the Second Incompleteness Theorem is that ZFC set theory as a whole is itself incapable of proving its own consistency. It presupposes its own consistency but is incomplete, as it cannot prove it. From a Badiouan perspective, this relates to the relative consistency proof that we discussed above: ontology is based on axiomatic decisions that open, as events, the space for their articulation by a faithful subject in an infinite truth procedure that bit by bit constructs an internally coherent mathematical universe. "When coupled with Badiou's decision that ZFC forms the a priori conditions for ontology, the Incompleteness Theorems of Gödel establish the necessity for there to be subjects" (Baki, 2015, p. 94). This holds, for Badiou, in strict homology to politics, as well.

> immanence. The exigency, then, is to step outside of the situation itself into a separate situation, the state. The metastructure corresponding to the state allows the situation to be represented and statements to be posited. The logical consistency of all the veridical statements is equivalent to the compositional consistency of the situation. (Baki, 2015, pp. 121-122)

From within the immanence of the situation, it can be seen as consistent because its count does not contradict itself. It counts only and all its members, not both members and non-members. This is compositional, or semantic, consistency. From within the larger, representing situation, the consistency of this very operation of counting itself can be guaranteed. This is veridical, or syntactic, consistency.

5.7 Extensionalism and constructivism

Furthermore, since, as mentioned, the power set (the state of the situation) is always "bigger" than the original set, there is, for Badiou, an excess of representation, of re-counting-as-one, over mere presentation. There is an excess of inclusion with regard to mere belonging (this is called the "theorem of the point of excess") (Badiou, 2006a, p. 98). Also, in Badiou's account of representation, representation does not mirror anything. It is an excess with regard to the presentation of the elements of the situation and does not correspond point-to-point with it. As Prozorov explains:

> [t]he metastructure does not simply provide representation to the already existing subsets of the situation, but rather establishes a certain positive distribution of subsets, which it must then secure from the disintegration into elements and a possible recomposition into 'illegal' subsets, whose existence is not validated by the metastructural recount. (Prozorov, 2008, p. 190)

The ways in which, say, a population of a nation can be represented are, for Badiou, in principle infinite, although "most" of them would be, of course, completely irrelevant, or "illegal," from the point of view of politics and law, such as combining into a set all those who have long hair. Each state of the situation seeks to secure, in such a historical situation, a certain, contingent but fixed metastructure that holds the present members at their "proper" places ("nature" or "natural situations" are somewhat different (see Badiou, 2006a, pp. 130-141)).

For Badiou, there are thus no natural criteria for creating groups out of elements — contrary to what "intesionalist" and "intuitive" positions in set theory would argue (see Hallward, 2003, p. 87). Indeed, in contemporary standard set theory, sets are understood *extensionally*, as defined by their elements, rather than intensionally, as defined by a prior concept, such as "being an even number," "being French," or "being a legal norm." Two sets are simply the same if their members are the same. In logic, "intension" is the definition of a concept or a term, its content. For

example, "law" can be intensionally defined as "a system of rules that a particular community recognizes as binding on its members." "Extension" is, by contrast, the domain of application of the term that encompasses all the objects that fall within it. Criminal law, public law, national law, international law, religious law, rules of a game etc. constitute the extension of the term (set) "law." In set theory, extensionalism is pushed to its extreme, as its central term, "set," is not defined at all. It is simply the count-as-one of inconsistent multiplicity and not tied to any intuitions about given classes of objects that all share some property, like that of being a law. A set is a collection of whatever elements, with no presuppositions about how things "naturally" fall into classes of objects.

The preference of extensionalism relates back to Russell's paradox, as it is precisely the intensionally defined set, the set defined by, say, the concept of the legal norm, that gives rise to the paradox. The paradox emerges, let us repeat, when we notice that such a set does not itself bear the predicate that defines it – the set of legal norms is not itself a legal norm – and then ask after the consistency of the set of all such sets that are not members of themselves (see Badiou, 2006a, pp. 39-42). Contemporary axiomatic and extensional set theory responds to the problem of the paradox by stipulating that a set is simply the members it presents, nothing more, not pre-defined by any linguistic concept or property that all the members ought to hold. Furthermore, due to the Axiom of Foundation, the self-membership of a set cannot arise. A set is not defined but merely stated in terms of the belonging relation that can be anything at all and does not require any predicates that its elements would share. An extensional set is like all the fish, seaweed and trash that the fisher's net collects, with no common denominator except being caught by the net (Hallward, 2003, p. 333). All predicates like "being an even number" or "being a legal norm" are *added to*, and thus presuppose, the elemental belonging relation (see Baki, 2015, p. 44).

The intensionalist definition, the Russell paradox and Russell's proposed solution to it are also related to mathematical constructivism. Constructivism, as already mentioned, equates language and existence: only what can be named in a well-formed language, exists. The language and its metalanguage police the limit between the sayable and the unsayable, and form the measure of existence (see 1.3.4). Constructivism, so understood, pretends to be, Badiou argues, "the master of the multiple" (Badiou, 2006a, p. 40). For constructivism, "*Being can never be in excess of language*, or at least any sufficiently well-constructed logical language" (Baki, 2015, p. 44, my emphasis). What characterizes constructivism, according to Badiou, is "the refusal to pursue contradictions to their ultimate (potentially transformative) upshot" (Norris, 2013, p. 72). As Christopher Norris notes, for Badiou, the constructivist solution to the set theoretical paradox:

> falls short of the rigour required of any adequate set-theoretical or indeed any adequate philosophical address to the issues involved. Indeed, [it] always seeks to accommodate any problematical instances — anything of an exceptional, paradoxical, anomalous, contradictory or logically recalcitrant nature — just so

> long as its threat can be neutralised or its disruptive potential disarmed by some such face-saving move. (Norris, 2013, p. 71)

The constructivist orientation understands *truth* as strictly *internal* to a conceptual scheme, language or system. Remember that Badiou thinks about sets as presenting consistently a *prior* multiplicity, which is itself inconsistent and unordered by any "natural" concepts or language. Against the anti-realist constructivist position that prioritizes (as we saw with Luhmann) *epistemology* and according to which well-defined languages determine what can intelligibly exist and what can count as true, Badiou affirms, with mathematics, the *ontological* priority of the inconsistent, the non-structured multiplicity beyond every possible knowledge. As Norris notes:

> it is a chief motivation of Badiou's whole project to challenge what he sees as the strictly preposterous or back-to-front order of priorities that finds no place for ontology except as a derivative or secondary field of enquiry subject to the scope and limits of human epistemic grasp, and which then looks to language — very often conceived in radically holistic or cultural-contextualist terms — as the ultimate horizon of knowledge or intelligibility. (Norris, 2012, p. 61)

Badiou then asserts, with extensional set theory, the ontological primacy of the multiple without concept, and leaves the notion of the set undefined, only stating that it simply corresponds to the belonging relation. What follows from this, for Badiou, is, as Livingston notes, that all extant languages and systems are incomplete: they presuppose the truth of the prior inconsistent multiplicity radically outside them. This constitutes the core of Badiou's "realism."

The critique of constructivism has also an important political register in Badiou's work. His aim is precisely to show that the regimentation of being by well-formed languages and the representation they provide of the presented being cannot be fully policed. For Badiou, the metastructure of a historical situation is strictly contingent and has no necessity to it whatsoever. He wants to show formally how the structuring by a language of a situation can be demonstrated incomplete, excluding what he calls "the truth," which makes the political rupture of a "state control" of a situation possible. Badiou will indeed wager that the gap between presentation and representation, situation and its State, *cannot ultimately be controlled by any further system of measure* (Badiou, 2006a, p. 278). There is no ultimate metastructure able to guarantee that a historical situation, with its inclusions and exclusions, is fully just. If this is the case, the event is thinkable and can take place.

What Badiou posits as *not* holding is known in set theory as the Continuum Hypothesis, which is (at least for now) an independent and undecidable hypothesis: it has neither been proved nor refuted. We will, of course, not enter the complicated mathematics behind this Hypothesis, but can understand it here minimally as suggesting that the relationship between an infinite set and its infinite power set *can be* regulated by a system of measure. The position in favor of the Hypothesis is, for Badiou, is a constructivist position: everything would ultimately be regulated by a

system of measure, which would mean the re-introduction of the complete and consistent Universe. The *im*measurability of the relation of the situation and its representation, and the rejection of the Hypothesis, is again a decision in a situation of undecidability. It is a wager that, according to Badiou, makes the event thinkable.[58]

5.8 Equality and thinking

We will come back to the general discussion concerning the differences between constructivist, generic and paradoxico-critical orientations, as well as the significance of these differences for legal theory, at the end of this chapter. Let us now advance to look in more detail at Badiou's theory of the event in a political register.

Badiou asserts, with set theory, the excess of representation over presentation. This implies that there are always some beings in a situation that are not properly represented by the state. For this reason, they form a potential "evental site" from which the rupture of the authoritative representation may occur — a rupture that the state always seeks to prevent. Badiou continues the Marxist tradition that prefers *presentation over representation*, struggles toward "the end of representation and the universality of simple presentation" (Badiou, 2006a, p. 108). For Badiou, the Marxist analysis of class society and the differential representation of class interests by the State exposed "a profound idea":

> *the State is not founded upon the social bond, which it would express, but rather upon un-binding, which it prohibits*. Or, to be more precise, the separation of the State is less a result of the consistency of presentation than of the danger of inconsistency. This idea goes back to Hobbes of course (the war of all against all necessitates an absolute transcendental authority) and it is fundamentally correct in the following form: if, in a situation (historical or not), it is necessary that the parts be counted by a metastructure, it is because their excess over the terms, escaping the initial count, designates a potential place for the fixation of the void. It is thus true that the separation of the State pursues the integrality of the one-effect beyond the terms which belong to the situation, to the point of the mastery, which it ensures, of *included* multiples: so that the void and the gap between the count and the counted do not become identifiable, so that the inconsistency that consistency *is* does not come to pass. (Badiou, 2006a, p. 109, original emphasis.)

[58] Baki discusses, understandably for non-mathematicians, the Continuum Hypothesis and Badiou's take on it (Baki, 2015, pp. 130-132, 164-165). He also explains Cohen's proof according to which the negation of the Continuum Hypothesis is consistent with ZFC, which established it as an undecidable. This is important for Badiou's philosophy of "forcing" (Baki, 2015, pp. 169ff.). Livingston and Hallward, for example, discuss Badiou's interpretation critically (Livingston, 2012, pp. 192-197; Hallward, 2003).

This resonates with our analysis of the sovereign immunologic and the attempt of a system to render inconsistency invisible. The threat is the inconsistency and the unbinding of the presentation: the dissolution of social order. This is an always-present possibility, given that it is precisely inconsistent multiplicity that is the very "stuff" of presentation, that what it presents as a consistent one. The State is founded, according to Badiou, on the logic of preserving the presentation from its unbinding and "return" to the void, and this requires keeping the contingent gap there is between presentation and representation as invisible as possible: "the function of the State is to number inclusions such that consistent belongings be preserved" (Badiou, 2006a, p. 109). As Hallward notes, "[t]he normal regime of a situation is structured in precisely such a way as to preserve an essential ignorance or 'unconsciousness' [*inconscience*] of its void" (Hallward, 2003, p. 102).

It is this preservation of consistency that the event must break. For Badiou, the State, and hence representation, is "precisely non-political, insofar as it cannot change, save hands, and it is well known that there is little strategic significance in such a change" (Badiou, 2006a, p. 110). The event reveals what the State seeks to hide: the inconsistent multiplicity that each situation counts-as-one. For Badiou, politics is always about "a politics of emancipation [that] does not have the State as its ultimate referent, but instead the particularity of people's lives, or people as they appear in the public space" (Badiou, 2005, pp. 92-93). The political question, for Badiou, "is how people are counted by the state. Are they counted equally? Are some counted less than others, or hardly counted at all? [...] It is through this kind of question that [...] democracy exists as a real and active figure, and not merely as a juridical, constitutional mechanism" (Badiou, 2001, p. 102). Badiou thus argues in favor of what we in Chapter 4 called "the double inscription of the political": politics is in no sense reducible to the constitutionally entrenched mechanisms of parliamentary politics (as it is for Luhmann). It must, rather, be understood in terms of an always particular process of a "fidelity to the event" that takes place in a concrete situation. For Badiou, the parliamentary democracy is, "when all is said and done, what Marx called an 'authorized representative' of capital" (Badiou, 2001, p. 99). It is Badiou's conviction that today's quintessential political question — "What kind of politics is *really* heterogenous to what capital demands?" — cannot be posed within such a system (Badiou, 2001, p. 106).

Let us take this gradually. Given the theorem of the point of excess, that is, the lack of point-to-point correspondence between presentation and representation, we can further see that different combinations of presentation and representation are possible. "I will call *normal*," Badiou says, "a term which is both presented and represented. I will call *excrescence* a term which is represented but not presented. Finally, I will term *Singular* a term which is presented but not represented" (Badiou, 2006a, p. 99). We have then the possible combinations of both membership and inclusion, inclusion without membership, and membership without inclusion. The event has its foundation in the Singular, in the member that is presented but not represented. Let us focus, in the following, on the Singular.

As said, for Badiou, all historical situations are founded on an element that counts as nothing within the situation. It is not a normal element that both belongs to the situation and is included in the state of the situation. This element thus escapes from representation: "it is that upon which the state's metastructure has no hold. It is a point of subtraction from the state's re-securing of the count" (Badiou, 2006a, p. 174). The foundational element cannot be represented because of its invisibility within the original situation, and representation can only re-count normal elements. Therefore, the foundational element is the weak point in the state's attempt to keep the situation consistent. One of Badiou's favorite examples are the undocumented migrants, *les sans papiers*, present on the French soil but unrepresented by the French State (see Badiou, 2001, pp. 96-105). If one counts the elements of the set "France" one by one, at some point one encounters its "foundational element," an element that is there but somehow obscure, as if it was not really there. This element, in the situation that is France, is, for Badiou, the *sans papiers*. They belong to France as limit-elements the presence of which is not fully recognized and that the State does not represent in its categorizations of the population present on the French soil in any other way but negatively, as "social problems" and "economic migrants" that "ought to be sent home." The state of France is built on the constitutive irrepresentability of the immigrant worker as an equal citizen. It thrives on his/her dispossession. In his later work, *Logics of Worlds,* Badiou re-names the foundational element that is but does not appear (is not represented) in the world as its *inexistent* (Badiou, 2009, pp. 321-324). The inexistent, he writes, "is in the world a being whose being is attested but whose existence is not. Or a being who happens 'there' as nothingness" (Badiou, 2009, p. 343). Given an object that appears in a world, such as "being a citizen," then the *sans papiers* are the proper inexistent of that object, beings who do not appear as citizens, whose appearance as citizens equal to others is of minimal degree.

However, the foundational element can turn into the site of the taking place of an event (Badiou, 2006a, p. 176). If the second count seeks to stabilize the consistency of the first count, it can nevertheless not abolish inconsistency, which is what Being-*qua*-Being ultimately is. Inconsistent multiplicity is, or so Badiou wagers, primary and indestructible. The event is about the irruption of primal inconsistency within the double count-as-one, making its contingent articulation and unification of multiplicity visible. It makes visible that all social wholes exist as results of a contingent operation of a distribution of parts. What the foundational-element-turned-into-the-evental-site, such as *sans papiers*' political protests, discloses are the unjust implications of such operations and the gap between representation and presentation. It exposes that there are beings with no recognized presence and to whom no secure position within the social whole is granted; beings who are excluded from law's protections, left without equal rights and legally secured access to the job market, state and its institutions; and beings who are included merely as a "social problem" without a secure access to the state within which these beings nevertheless *are*.

These political protests seek to make visible that the claim of the state to guarantee the consistency of the situation by counting all its elements fails, that the states' claim to equal treatment of all members is a false one (Norris, 2009, p. 92). Not

everyone who is present is equally recognized as such nor counted in institutionally. This constitutes, the protesters claim, an injustice, a violation of the *universal truth of equality* of anyone with everyone. What happens in a political event, is, for Badiou, that belonging and inclusion are exposed as contingent articulations of inconsistent multiplicity and their unjust effects are challenged in the name of universal equality. Indeed, if inconsistent multiplicity is primary, if extensionalism holds and beings cannot be categorized by intrinsic properties, challenging contingent unifications as unjust is simultaneously about re-affirming one's primary truth, *equality*, by subtracting oneself from all *unequalizing* measures. "Finally to count as one that which is not even counted is what is at stake in every genuinely political thought, every prescription that summons the collective as such" (Badiou, 2005, p. 150).

Political event (just like other events that, for Badiou, can be scientific, artistic or amorous) is about the presentation of the nothing of a situation. Just like the determination of the primacy of inconsistent multiplicity over figures of the One is, for Badiou, a decision taken in conditions of undecidability, and not a logical deduction from true premises, also the political event shares this axiomatic grounding. *What counts as nothing cannot be directly presented in ontology*. Events are always localized in particular situations (they are not other-worldly), they always challenge a particular situation and its state, although it is precisely that what *cannot* register within it (Badiou, 2006a, p. 178). Insofar as ontology precisely is about unification of inconsistent multiplicity, about measuring it, unmeasured equality does not and cannot register within it. Badiou's argument that constructivism is not all there is, that not everything can be proved by existing forms of knowledge and expressed in well-formed languages adds the supplement of "truth" to what can be verified as ontologically legitimate in an extant situation. He distinguishes between epistemology and the event, between *knowledge*, "[w]hat transmits, what repeats," that is always ontological and produced by the state of the situation in its organization of the parts, and *truth* which surpasses ontology as something "new." The problem for thinking about truth, or novelty, is its "becoming," its emergence (Badiou, 2004, p. 61).

Thinking breaks with repetition and what extant knowledge can prove correct. Just like the mathematical breakthrough that was the birth of contemporary axiomatic set theory attests to *the powers of thought beyond what can be epistemologically recognized* as correct, also political events attest to the generic, universal human capacity of thought. Thinking (or philosophy) and politics are not the same, but they both attest to the universal capacity of human beings to discern a truth in conditions of its epistemic unrecognizability. Badiou writes:

> Some political orientations, throughout history, have had or will have a connection with a truth, a truth of the collective as such. They are rare attempts, often brief, but they are the only ones under [the] condition [of which] philosophy can think about. These political sequences are singularities, they trace no destiny, they construct no monumental history. Philosophy can, however, distinguish in them a common feature. This feature is that these orientations require of the people they engage only their strict *generic*

humanity. They give no preference, for the principles of action, to the particularity of interests. These political orientations induce a representation of the collective capacity which refers its agents to the strictest equality.

What does "equality" mean? Equality means that the political actor is *represented under the sole sign of his specifically human capacity*. Interest is not a specifically human capacity. All living beings have as an imperative for survival the protection of their interests. *The specifically human capacity is precisely thought, and thought is nothing other than that by which the path of a truth seizes and traverses the human animal*.

Thus a political orientation worthy of being submitted to philosophy under the idea of justice is an orientation whose *unique general axiom is: people think, people are capable of truth*. (Badiou, 1999, p. 29, my emphasis.)

"Equality" here is nothing "objective," Badiou says, it is not about equality of income, status or even rights. "It is a political maxim, a prescription. Political equality is not what we want or plan, it is what we declare under fire of the event, here and now, as what is, and not what should be" (Badiou, 1999, p. 30). Equality is an axiomatic truth that is declared in conditions that do not allow for its recognition. Just like with the mathematical axioms, the axiom of equality is not defined, it is not given content (or, as we will see, it will be given content later on, in the subjective process of "forcing" its truth in a situation). "Thought, on this point, cannot use the scholastic method of definitions. It must follow the method of the understanding of an axiom," Badiou argues (Badiou, 1999, p. 30). Defining equality is what the state does, and by doing so, it betrays the maxim, turning equality into a management of interests and identity groups.

Badiou affirms, with Jean-Jacques Rousseau, that "equality *is* politics, such that, *a contrario*, any in-egalitarian statement, whatever it be, is anti political" (Badiou, 2006a, p. 347). Equality is extensional: it collects in a generic set all (human) beings simply as equal, without any predicates that would introduce differences between them. "Generic humanity" is humanity without identity predicates that distribute human beings into different, hierarchically organized categories ("men," "women," "black," "white," etc.). The universal community of equals is the political homologue to inconsistent multiplicity in ontology. Just like the nothing, such a community cannot be a positively existing one. It cannot have a positive form, as we now know that the Universal Community of all human beings with no excess, a complete and consistent One, is impossible. It is rather what is subtracted from every positive figure of community in a political sequence that interrupts the inequalities and injustices that such a community produces:

> We have too often wished that justice find the consistency of the social tie, while it can only name the most extreme moments of inconsistency. For the effect of the equalitarian axiom is to undo the ties, to desocialize thought, to affirm the rights of the infinite and the immortal against finitude, against Being-for-death. In the subjective dimension of the equality that is declared, nothing else is of

interest except the universality of this declaration, and the active consequences that it gives rise to. (Badiou, 1999, p. 32)

The generic humanity and axiomatic equality are affirmed against a *finite*, positive organization of beings and the injustice that a state of the situation implies, against its false claim that it represents equally all beings that there are. It is to affirm what is infinite, irreducible to any finite collective formation, and universal, shared by all as human beings, against the inequalities of the situation. To act politically is to think about the truth of equality of anyone with everyone that is unrecognizable within the state of the situation and the knowledge it can provide of its members and their parts. It is to present the member who counts as nothing as an equal, disidentifying it from the place (the void) it is made to hold in the situation.

5.9 The paradoxical self-nomination of the event

To break with the nullification of equality within a positive order, the event must break so completely (using classical logic that we discuss in a moment) with the situation and its metastructure that it is, in fact, initially completely indiscernible and unnamable within it. Ontologically, *there are no events*: an event transgresses ontology, is ontologically (set theoretically) formalizable only in an unacceptable matrix, namely as an inconsistent, self-belonging set (Badiou, 2006a, pp. 189-190). Up until the formulation of the event, Badiou's ontology is fully in conformity with constructivism the insufficiency of which Badiou nevertheless seeks to show with the theory of the event. In contrast to the consistent situation, an event is inconsistent: it cannot be proved in terms of the situation to have taken place; "ontology declares that the event is not" (Badiou, 2006a, p. 190). It can only take place as a supplement to being (Badiou, 2006a, p. 17).

The event cannot be said to happen simply in the now because of its unrecognizability within the frame of recognizability offered by the situation. "If it is possible to decide, using the rules of established knowledge, whether this statement [that an event is taking place] is true or false, then the so-called event is not an event. Its occurrence would be calculable within the situation" (Badiou, 2004, p. 62). The political sequence that first recognizes the significance of a social movement as a political event that affirms the axiom of equality, and then traces its implications, begins with a decision to affirm that the event is, in fact, taking place. This requires naming the event as an event by those who take part in it. The event lacks a context of recognition, so the only way for it to indicate its happening is reflexive: *self-nomination*. The event must name itself. Those who recognize themselves as taken by it must indicate this and give it a name, like "Paris Commune" or "French revolution." Beginning of a political sequence is *the paradoxical self-nomination of the event*.

"I term event of the site X a multiple such that it is composed of on the one hand, elements of the site, and on the other hand, itself" (Badiou, 2006a, p. 179). The

event is self-founding, and this ejects it outside ontology regulated by the Axion of Foundation, which posits that each set is based on "an Other" at the edge of the void. Such Otherness is lacking from the event: the event has "no Other in itself, no element of [a] such that its intersection with [a] was void" (Badiou, 2006a, p. 190). An event is fully self-sustaining vis-à-vis the situation in which it nevertheless takes place, by transforming the Other of the situation, its foundational element, into an evental site, that is, into a set that counts its elements *and* itself. No "constituted order" sustains such an evental set and regulates its meaning, Badiou argues; the only option left to get the event off the ground is self-reference, self-declaration: a self-constitution.

What exactly took place in March 18th, 1871, when the French government forces disarmed rebellious workers? "The answer is," for Badiou, "the appearance of worker-being — up until then a social symptom, the brute force of uprisings or a theoretical threat — in the space of political and governmental capacity" (Badiou, 2009, p. 365). March 18th, 1871 appears, retroactively, as "the fulminant and entirely unpredictable beginning of a break with the very thing that regulates its [worker-being's] appearance" (Badiou, 2009, p. 365). It appears as the beginning of the political sequence that was the Paris Commune. For Emilios Christodoulidis, "the intriguing moment here in Badiou's thinking is the contrast of the structuring function to what *'in-consists'* and the question over what it means to 'be' but *not* 'be counted-for-one', *not* situated, but in-consistent" (Christodoulidis, 2011, p. 134, original emphasis). *In-consistence* — the appearance of what cannot be contained within the state of the situation — is about breaking the laws of ontology and appearance in a way that opens the possibility for a previously invisible and unheard-of articulation of reality to suddenly appear.

Besides the Paris Commune, another paradigmatic example (to which the Commune was "faithful") is the French Revolution:

> One could certainly say that the event "the French Revolution" forms a one out of everything which makes up its site; that is, France between 1789 and, let's say, 1794. There you'll find the electors of the General Estates, the peasants of the Great Fear, the sans-culottes of the towns, the members of the Convention, the Jacobin clubs, the soldiers of the draft, but also, the price of subsistence, the guillotine, the effects of the tribunal, the mas-sacres, the English spies, the Vendeans, the *assignats* (banknotes), the theatre, the *Marseillaise*, etc. The historian ends up including in the event "the French Revolution" everything delivered by the epoch as traces and facts. This approach, however — which is the inventory of all the elements of the site — may well lead to the one of the event being undone to the point of being no more than the forever infinite numbering of the gestures, things and words that co-existed with it. The halting point for this dissemination is *the mode in which the Revolution is a central term of the Revolution itself*; that is, the manner in which the conscience of the times — and the retroactive intervention of our own — filters the entire site through the one of its evental qualification. (Badiou, 2006a, p. 180, original emphasis.)

What is at stake in revolution is its very taking place itself that the State refuses. While all these different elements can be readily recognized as "historical facts" — they belong to the motley set that is the situation — what escapes this dissemination and cataloguing is the taking place of the French Revolution. No catalogue of events can disclose the Event itself; "its belonging to the situation of its site is undecidable from the standpoint of the situation itself" (Badiou, 2006a, p. 181, emphasis omitted). The mere extensional set of elements presented is not enough to filter out the revolution: reflexivity is needed to pinpoint — indicate, name — that a political collective has emerged. Only the self-nomination of the event can begin to subtract a truth from the mere dissemination of facts. A regress that looks for the foundational element is blind to the event that transgresses the Axiom of Foundation. For Badiou, "a truth is always that which makes a hole in a knowledge" (Badiou, 2006a, p. 327). *That* the event is actually taking place is undecidable in the situation in which it takes place, and for this reason its happening can only be a matter of *a wager*, a decision, that the event *is* indeed taking place: only a decision to name can begin to mark the gap between the consistent ontological situation and the political event (Badiou, 2006a, p. 201).

An event can only retroactively be seen to have taken place, and such retroactive temporality is the time of the subject and fidelity to the event. As Badiou says, "a site is only 'evental' insofar as it is retroactively qualified as such by the occurrence of an event" (Badiou, 2006a, p. 179). The temporality of the event is the difficult time of retroaction and future anterior. As Hallward puts it, "evental nomination is the creation of terms that, without referents in the situation as it stands, express elements that will have been presented in a new situation to come, that is, in the situation considered, hypothetically, once it has been transformed by truth" (Hallward, 2003, p. 124). Workers' auto-nomination as the revolutionaries and self-representation as equals, as political actors and not as a mere social class, bring as a fleeting event into the present a future that, were it realized, would transform the extant state of the situation within which the political workers equal to other citizens count as nil. To keep this presentation of equality alive, the political subject faithful to the trace of the event must pick up this truth and force it into reality.

5.10 The three negations: the event's classical logic

We can then agree with Hallward when he says that for Badiou,

> [w]hatever the circumstances, the struggle for truth takes place on the terrain first occupied by the state. It involves a way of conceiving and realizing the excess of parts over elements in a properly revolutionary (or disordered, or inconsistent) way, a way that will allow the open equality of free association to prevail over an integration designed to preserve a transcendent unity. (Hallward, 2003, p. 97)

The radicality of the event is about the irruption of inconsistency within a consistent situation. It remains strictly unknowable within the epistemological limits of this situation. Badiou's metalogical preference allows him to draw a stark contrast — one of classical logic in which both the principle of contradiction and the principle of the excluded middle hold — between the context and the novelty. Things are black and white, at least in the best of cases when the event of politics resonates to the maximum: P against non-P, with no third options. Badiou explains:

> In my philosophical vision, in a given world, we have something new only if the rational or conventional laws of this world are interrupted, or put out of their normal effects, by something which happens, and that I name an Event. Clearly, the consequences of this event sustain a negative relationship to the laws of the world. [...] So we can say that a truth [...] is a part of the world, because it is a set of consequences of the event in the world, and not outside. But [...] we can [also] say that a truth is like a negation of the world, because the event itself is subtracted from the rational or conventional laws of the world. We can summarize all that in one sentence: A truth is a transgression of the law. "Transgression" first signifies that a truth depends on the law, and second is nevertheless a negation of the law. (Badiou, 2008b, p. 1878)

A truth, such as a declaration of equality, always takes place within a situation defined by, among other things, positive legal determinations of equality (such as by legal rights to citizenship or vote), but it is about transgressing the possibilities recognized by the law, and therefore going beyond the law. In this sense of transgression and negation of the law, Badiou's politics is *post-juridical*.

Badiou lists, in an essay titled "The Three Negations," three different combinations of the principles of negation, namely the interdiction of contradiction (not both P and non-P) and the excluded middle (either *P* or *non-P*). The first is *classical logic*, in which both principles hold, the second *intuitionist logic*, in which only the principle of contradiction holds, and the third *paraconsistent logic*, in which, according to Badiou, only the principle of the excluded middle holds. "[T]he potency of negation is weaker and weaker when you go from one to three[, b]ecause the destructive power of negation diminishes," Badiou claims (Badiou, 2008b, p. 1879). As it turns out, for Badiou, paraconsistent logic, the one which accepts paradox, gives the weakest force to negation.

Let us see why this is the case. Ontology (set theory), Badiou begins, obeys classical logic in which both principles are true. A set is defined, as we saw, extensionally, through its members. This implies that "[t]wo multiplicities are different if and only if there is some element of one multiplicity which is not an element of the other." The set P and the set of everything that does not belong to P can be clearly formulated: "P and non-P have nothing in common" (Badiou, 2008b, p. 1880). The principle of non-contradiction holds, because there is nothing that would be both P

and non-P. There is also no space, so to speak, between P and non-P, but everything falls either to P or to non-P. The principle of the excluded middle holds.

In his later work *Logics of Worlds*, Badiou supplements his metaontology of *Being and Event* with a formal theory of appearance and existence, and this brings into view other forms of negation than the classical one. Badiou calls this theory "objective phenomenology": it is a theory of appearance, of logic of phenomena, just like classical, Husserlian and Heideggerian phenomenology. "The law of things is to be *qua* pure multiplicities (as things) but, equally, to be there *qua* appearing (as objects)" (Badiou, 2011, p. 49). However, unlike the classical versions of phenomenology, Badiou abandons the presupposition of the transcendental subject and existing (human) Dasein, the lived dimension of appearance as experienced *by someone* (Badiou, 2009, p. 38; Badiou, 2011, pp. 44-46). He argues for a mathematical (based on category theory) and hence "objective" ontology that has no use for the transcendental subject of classical phenomenology.

Badiou will now focus on ontological situations as "worlds," as the localizations of "being-there," as "places" in which objects come to appear and exist in different degrees of intensity. He re-defines metastructure as "the transcendental," the structure that assigns degrees of appearance within a world to those beings that belong to it. The transcendental is, for a situation, "the law of its appearing" (Badiou, 2009, p. 101), and it is what accounts for the immanent consistency and coherence of the world in question. Badiou writes: "our operational phenomenology identifies the condition of possibility for the worldliness of a world, or the logic of the localization for the being-there of any being whatever" (Badiou, 2009, p. 103). Each world, be it the Heideggerian workshop, the world of law or "end of an autumn afternoon in the country" (Badiou, 2009, p. 139), has its own transcendental order that structures ("indexes") how beings may come to appear within it, as what they appear and with which relations to other beings, and what remains inexistent or inapparent within it.

"Consistency" means here "consisting together of beings as a world," regulated by a specific transcendental order or law of appearance. The logic that regulates this consisting is not necessarily classical but rather intuitionistic, because appearance may take different degrees. Something may appear more or less intensely; beings have different degrees of existence. Some beings "appear" as inexistent altogether. One of Badiou's examples of the degrees of appearance is the red of the ivy on the wall at sunset: during the time the light fades away, the red of the leaves neither "continues to shine forth" nor does it not continue to shine forth: the classical opposition does not aptly capture the subtle changes in the intensity of this color relative to the amount of light (Badiou, 2009, p. 184). For a "daydreamer reclining between two trees [...] the presence of the other trees [is but] a blurred haze behind the leaves s/he is so intently gazing at[.] Any *one* plane tree within this surrounding rippling blur is an inexistent of the world" (Badiou, 2011, p. 59).

Against this background of "objective phenomenology," Badiou then states:

> if the great field of the law is always a concrete world, or a concrete construction, its logic is not classic. [...] If the sentence P is "guilty," and non-P "innocent,"

> we have always a great number of intermediate values, like "guilty with attenuating circumstances," or "innocent because certainly guilty, but with insufficient proof," and so on. (Badiou, 2008b, p. 1881)

With Luhmann we could say that law does, however, retain from classical logic its code — things are for it either legal or illegal — but law's programs "dilute" the harshness of the classical affirmation and negation by putting in place conditions for the code's application such that we then have an intuitionist logic as Badiou describes, with different degrees of the intensity of existence and appearance of objects such as "being guilty."

We already noted that for Badiou, "[a] truth is a transgression of the law. 'Transgression' first signifies that a truth depends on the law, and second is nevertheless a negation of the law" (Badiou, 2008b, p. 1878). Although a world of law might be regulated by a logic that allows for different degrees of appearance, what politics is fundamentally about is to bring to *maximal appearance* a being that exists *only minimally* within a world, its degree of appearance being zero. With the event, the classical logic returns: "The equalitarian axiom is present in political statements, or it is not present. And by consequence, we are within justice, or we are not. Which also means: the political exists, in the sense that philosophy encounters its thought within it, or it does not" (Badiou, 1999, p. 30).

From the perspective of the state or the transcendental of a world, there is no such thing as, to use Badiou's own favorite example, "political proletariat," but the becoming political of the workers is the event that in some way happens in the situation/world despite its being strictly impossible to perceive according to the laws that regulate appearance in it. Badiou describes the Spring 1871 in France, prior to the emergence of the Paris Commune:

> [T]he historical consistency of this world, split and unbound by the consequences of the war, rests on the prevailing conviction about the inexistence of a proletarian governmental capacity. For the vast majority of people, often including the workers themselves, the politicized workers of Paris are incomprehensible. They are the proper inexistent of the object "political capacity" in the uncertain world of this Spring 1871. (Badiou, 2009, p. 364)

In the example of the Paris Commune, "from the standpoint of rule-bound appearing, the possibility of a proletarian and popular governmental power purely and simply does not exist" (Badiou, 2009, p. 366). It is this inexistent that the event negates:

> The crucial point is the change of intensity in the existence of something the existence of which was minimal. For example, the political existence of poor workers in a revolutionary event[.] I name an "inexistent" of a world a multiplicity which appears in this world with the minimal degree of intensity, something which, in this world, appears as nothing. The question for an event

> is: what is the destiny, after the event, of an inexistent of the world? What becomes of the poor worker after the revolution? (Badiou, 2008b, p. 1882)

The event may have different implications. In the case of the "true event," "the strength of the change is maximal" (Badiou, 2008b, p. 1882). That what appeared with the minimal degree of intensity within a world will now appear with the maximum of intensity. The logic is classic: "The whole world, from the point of view of the event and of its consequences, is formally reduced to the duality of minimal intensity, or inexistence, and maximal intensity" (Badiou, 2008b, p. 1882). *P* negates the *non-P*. True political event is about "existential absolutization of the inexistent" (Badiou, 2009, p. 394):

> The proletariat is completely subtracted from the sphere of political presentation. The multiplicity it is can be analysed but, according to the rules governing the appearance of the political world, it does not appear within this. It is there but with the minimal degree of appearance, namely, degree zero. This is obviously what the *Internationale* proclaims: "We are nothing, let us be all!" [...] Those proclaiming "we are nothing" are not in the process of affirming their nothingness. They are simply affirming that they are nothing in the world as it is, as far as appearing politically is involved. [...] Becoming "all" presupposes, then, a change of world, which is to say, a change of transcendental. The transcendental has to change in order for the assignation to existence and, thus, the inexistent as a multiplicity's point of non-appearing in a world, to change in its turn. (Badiou, 2011, pp. 61-62)

The vector of change obeys classical logic: *from being nothing to being everything, from minimal to maximal appearance*.

It is also possible that the event's results are only moderate, and they bring only "reform." In this case, the force of negation is less intense, and logic is intuitionistic. Paraconsistent logic, the logic that may (in some of its versions) allow the appearance of paradoxes, as we discussed in the Introduction, is something through which the event must proceed to the affirmation of the classical logic. All events first take place in conditions of undecidability, because the situation and the world in which they emerge do not allow a framework for their recognition. From the perspective of the state, nothing happens. It is this contradictory *simultaneity of event and non-event* that the event must surpass in order to bring the minimally existent to maximal existence within a world. Otherwise it remains minimal and the event "a false event, or a simulacrum." "The lesson is that," Badiou concludes, "when the world is intuitionistic, a true change must be classical, and a false change paraconsistent" (Badiou, 2008b, p. 1883).

Notice here the curious "doubling" of the paradox that we have encountered already several times. On the one hand, paradox is an explosion, the impossibility to distinguish this from that (here, the event as simulacrum), but on the other, it is also a necessary figure of limit-transgression (here, the self-referential event) that makes a

new distinction, or truth, possible (here, what appeared minimally, now appears maximally). Paradox seems to have, across contemporary political and legal thought, both negative and positive value; it is both "good" and "bad."

5.11 The faithful subject and the truth procedure: The case against constructivism

Negation is important for Badiou, since in his view "[a]ll the categories by which the essence of a truth can be submitted to thought are negative: undecidability, indiscernibility, the generic not-all (*pas-tout*), and the unnameable" (Badiou, 2004, p. 58). The "positivity" of truth, its "procedure of verification," is a matter of the emergence of the faithful subject: the one who decides, names, discerns the generic set and forces transformation in the name of the event (Badiou, 2004, p. 62).

The political sequence of the decision to affirm the event, name it and trace its consequences to the situation in which it takes place (and beyond it) is what gives rise to what Badiou calls the faithful, or militant, political subject. The political subject is the collective of all those, contemporaries or separated by centuries, who decide to be faithful to the event of the declaration of equality and trace its consequences to various situations. The wager that affirms that the event takes, and took, place and that it is indeed consequential in a situation is an "intervention": "any procedure by which a multiple is recognized as an event" and without which the situation remains in the grip of the state and paraconsistent logic that does not allow a clear opposition between the situation and the event to arise (Badiou, 2006a, p. 202). As Bruno Bosteels suggests, "what matters the most [for Badiou] is not so much the abrupt irruption of a point of the impossible, or of a set that paradoxically belongs only to itself, but the implicative regime of consequences to which an event will have given way in the aftermath of its irruption" (Bosteels, 2011, p. 176).

To affirm that an event took place is to affirm a truth: that what escapes established frameworks of knowledge. The stabilization of the truth of the event unfolds as an "examination" of the elements of the situation: the subject evaluates these elements and decides, always subjectively, whether they connect to the event positively or negatively (Badiou, 2006a, p. 233). Such a process of examination constitutes "fidelity" to the event:

> I call *fidelity* the set of procedures which discern, within a situation, those multiples whose existence depends upon the introduction into circulation (under the supernumerary name conferred by an intervention) of an evental multiple. In sum, a fidelity is the apparatus which separates out, within the set of presented multiples, those which depend upon an event. To be faithful is to gather together and distinguish *the becoming legal of a chance*. (Badiou, 2006a, p. 232, my emphasis.)

The subject faithful to the event will constantly need to ask him/herself: "how to act, if 1789 is a revolution, and not a disorder?" (Meillassoux, 2012, p. 3). Faithfulness takes place as the infinite truth procedure that, on the axiomatic-decisionist grounds, traces out the implications of the universal axiom of equality that the revolution declared to an infinite number of situations and worlds in which inequality reigns.

The truth procedure advances according to the classical logic in the sense that it "investigates" whether this or that element of the current situation, say, the suffrage limited to propertied male only, affirms or negates the event of equality (and, why not, the truth of freedom and fraternity, see Prozorov, 2013a). The compatibility of an element with the event and the project of bringing into maximum appearance what was only minimally presented depends on the decision of the faithful subject. An element must be transformed according to the decision: for example, the decision that the suffrage limited to propertied male only is not compatible with the event compels its transformation by attributing the equal right to vote also to women and all non-propertied. Bringing women and the unpropertied to maximal existence in democratic institutions is, furthermore, by no means the end of the truth procedure. The tracing of the consequences of equality may continue by expanding the scope of the right to vote even further, including within it, say, resident aliens. It may also be continued on other domains, like that of work and home. "The attainment of maximal existence in one region of the world," as Prozorov explains, "serves as a support for continuous affirmation of the axioms in other regions without guaranteeing the success of this affirmation" (Prozorov, 2013b, p. 11). The truth procedure that engages the faithful subject is necessarily *infinite*, as there is no shortage of inequality and inexistence in any positive situation or world and as the Universe, a positive realization of full equality (or full freedom and fraternity) of all beings cannot exist.

Politics, for Badiou, is an attempt to *reduce the complexity of the world* to a simple, binary code between "yes, this element supports the event" or "no, this element does not support the event" (Badiou, 2009, pp. 82, 420, 439; see also Prozorov, 2013b, pp. 7-8). The result of this intricate interrogation that advances from one concrete situation to the next is a new infinite set. This is the "generic set" that emerges out of the gap between the situation and its state, being indiscernible in the pre-evental situation (Badiou, 2006a, p. 333). It is a truth that "subtract[s] itself from this or that jurisdiction of knowledge" (Badiou, 2006a, p. 328) and is therefore an exception to what can be verified within any of them. The "generic multiple" is "the indiscernible, the unnameable, and the absolutely indeterminate" from the point of view of ontology and the situation. "The being of a truth, proving itself an exception to any preconstituted predicate of the situation in which that truth is deployed, is to be called 'generic'" (Badiou, 2006a p.xiii). A truth is unknowable, but, Badiou argues, "it can be demonstrated that it may be thought" (Badiou, 2006a, p. 16). The infinite truth procedure dislocates the metastructure of a situation S by re-counting its elements into a new, generic set that is a subset of S totally incongruous to its prevailing metastructure. "Little by little," Badiou writes, "the contour of a subset of the situation

is outlined, in which the effects of the evental axiom are verified" (Badiou, 2004, p. 64).

For example, re-counting elements in a way faithful to the presupposition of equality of anyone with everyone, cuts through, if carried on, all initial subsets, nullifying the force of all existing predicates and relations and *making them indifferent to equality*. The generic set thus advances to include not only men, as is usual, but also women, not only propertied but also non-propertied, not only the rich but also the poor, not only the white but also the black, not only the religious but also the non-religious, not only the French but also the non-French... This indexing of elements to the generic set suspends the significance of these differences and categories, which come to have *no determinative power over the formation of the set*. In comparison to the sets of, say, all men, all the white and all the propertied, the generic set contains at least one element that is not in those sets, as it contains women, black and non-propertied. Thus, it is *indiscernible* if observed within those sets. The power of the extant state of the situation to categorize beings is rendered inoperative, as the generic set collects together beings as equal, whatever identities they (are made to) have.

As Agamben is quick to note, the militant subject (or the truth procedure) has the paradoxical structure of the exception:

> In Badiou's scheme, the exception introduces a fourth figure [in addition to normality, singularity and excrescence; HL], a threshold of indistinction between excrescence (representation without presentation) and singularity (presentation without representation), something like a paradoxical inclusion of membership itself. *The exception is what cannot be included in the whole of which it is a member and cannot be a member of the whole in which it is always already included*. What emerges in this limit figure is the radical crisis of every possibility of clearly distinguishing between membership and inclusion, between what is outside and what is inside, between exception and rule. (Agamben, 1998, pp. 24-25, emphasis in the original.)

Indeed, the truth procedure, by simply counting beings in the generic set, *presents* them as equal members of this set, beyond their *re*presentation in the metastructure of the situation that allocates them to unequal positions. In this sense, it prefers presentation over representation. But Badiou also says that "[t]here is always something institutional in a fidelity, if institution is understood here, in a very general manner, as what is found in the space of representation, of the state, of the count-of-the-count; as what has to do with inclusions rather than belongings" (Badiou, 2006a, p. 233). The generic set that presents equal members without any predicates is a subset, hence a representation, and just like the state, an excrescence and an excess of representation vis-à-vis the extant presentation. It represents to the maximal degree what in the extant situation is presented as nothing. The militant subject is the exception, "a paradoxical inclusion of membership itself." That is, to speak with Jacques Rancière (who is very close to Badiou and who also makes the metalogical

choice in favor of incomplete consistency, although I cannot show it here, setting "the police" and "politics" against each other): politics presents "the part of those who have no part" (Rancière, 1999, p. 30).

For the inhabitant of the situation, the generic set is unverifiable, it does not exist in the field of knowledge, but, again, as a "hypothesis" or axiom that opens the process of verification, that is, the transformation of the metastructure of the situation such that it comes to recognize, say, the indifference of gender to equality. The temporality of faithfulness is the future anterior: the faithful subject treats the generic set and the presentation of equality of men and women as something that will have been verified, once the situation is transformed according to the axiom of equality; until then it remains affirmed as an axiomatic truth.

It is thus exactly like with the axiomatic grounding of mathematics itself: the proof technique known as "consistency proof," that we mentioned above, applies also to the politics of truth. As Norris notes, for Badiou, "issues of choice and commitment in mathematics, logic and the formal sciences find a more than vaguely suggestive analogue in the realms of ethics and politics" (Norris, 2009, p. 177). This technique cannot establish any "absolute" proof of consistency of a proposition on the spot, so to speak, but only its "relative" consistency, beginning from a set of axioms ("human being thinks," "equality is universal") presupposed as consistent and then advancing on their basis to see what fits consistently with them, transforming the world and distributions of parts in it bit by bit, such that the world slowly becomes consistent with the axioms.

Such a task can only be infinite, because no world can realize the axiom of equality in full and, furthermore, there are an infinite number of worlds. Equality as a political maxim always remains a critical supplement to how things stand, and a hypothesis that they can be transformed according to this maxim. There is no One, Being-*qua*-Being is nothing but inconsistent multiplicity and each count-as-one is contingent. When an event takes place, the inconsistency on which each consistent count-as-one is ultimately based is revealed, and this opens the door to the "diagonal," bringing about the presentation of equality of anyone with everyone and the possibility of a novel articulation of how things stand. Truth is, for Badiou, not objective but strictly subjective, and the subject is the faithful subject of the infinite truth procedure, the militant who forces the implications of the axioms into reality.

The faithful subject who collects the members of the generic set follows the *technique of diagonalization* that we discussed in the Introduction (see Badiou, 2006a, p. 337). Formulating an indiscernible set in mathematics was the great achievement of the American mathematician Paul Cohen, and Badiou uses this innovation in his philosophy and metapolitics (philosophy of politics). The truth procedure articulates something — an aspecific subset of a situation on the sole grounds of universal equality — that cannot figure in the state of the situation as it currently stands. The generic set contains elements that are indiscernible from within that situation, and yet it belongs to the situation as its subset. The faithful subject "diagonalizes" the situation, splits it into two, by discerning both the elements that resonate with the event and those that are indifferent to it (Badiou, 2006a, p. 237):

> It is clear that this [generic] subset is infinite, that it remains indeterminable. Yet it is possible to state that, if we suppose its termination, then such a subset will ineluctably be one that no predicate can unify — an untotalizable subset, a subset that can be neither constructed nor named in the language. [...] Indiscernible in its act, or as Subject, a truth is generic in its result, or in its being. It is withdrawn from any unification by a single predicate. (Badiou, 2004, p. 64)

Cantor used the diagonalization technique to indirectly prove that infinite sets come in different cardinalities (see 1.3.2). It operates by picking up one element from each subset of the situation defined by a property (from the set of men, women, propertied, migrants etc.), thus giving rise to a subset of the situation (the generic set of the community of equals) that no extant categorization can discern. This subset presents a supplement to the consistent situation, showing its incompleteness. In politics, diagonalization is about "a 'generic' democracy, a promotion of the commonplace, of equality abstracted from any predicate" (Badiou, 2004, p. 68).

Diagonalization breaks with the constructivist universe, with the direct verifiability according to which there are only beings that an existing language can name and control. A critique of constructivism requires, for Badiou, the faithful subject who deconstructs the state of the situation as the only horizon for intelligibility, and discerns, along the diagonal, the indiscernible among the elements of the situation: that what carries such names as the Paris Commune and the French Revolution. The subject shows that the real as inconsistent multiplicity is never reducible to any of its positive presentations, representations and modes of appearance. In *Logics of Worlds*, Badiou contrasts his theory of universal truth to constructivism that he calls "democratic materialism." According to this form of constructivism, "there are only bodies and languages" and nothing besides them (Badiou, 2009, p. 2). Badiou opposes what he sees as the post-modern and post-structuralist relativism that reduces everything to local language-games and forms of life and is unable to rethink the universal. Against this post-modern nihilism he then argues for the axiomatic, exceptional, truths that as universal cut across the infinite number of positive worlds thanks to faithful subjects who take up the event of their worldly appearance and pursue their local consequences. "*There are only bodies and languages, except that there are truths*" (Badiou, 2009, p. 4) — this expresses what could perhaps be called Badiou's "constructivism+" (I return to this) as well as his metalogical preference for consistency and incompleteness. Truth is the exceptional supplement to a language and the multiplicities controlled by it (Badiou, 2009, p. 10).

Badiou's realism then targets the positions according to which:

> truth cannot possibly exceed the limits of proof, ascertainment or demonstrative warrant since to assert otherwise — to claim (in typically realist fashion) that we know that there exist unknown or even for us unknowable

truths — is to fall in to manifest self-contradiction or plain nonsense. (Norris, 2009, p. 183)

Badiou's theory of militant truth procedure distinguishes truth as transcendent to what can be asserted with a warrant, and argues that were we to restrict thinking to what can be justified within given languages, nothing radically new — no scientific, artistic or political revolutions, nor for that matter falling in love — would ever take place. To think about radical novelty and the possibility of transformation requires a certain realism: that not everything is confined within given frameworks of language and knowledge, that what counts as nothing within them holds the possibility of surprising, transformative novelty. "Politics," then, "can be defined sequentially as that which attempts to create the impossibility of non-egalitarian statements relative to a situation, and as what can be exposed through philosophy, and by means of the word 'democracy,' to what I would call *a certain eternity*" (Badiou, 2005, p. 94, my emphasis).

5.12 Post-juridical politics: The metalogical preference for consistent incompleteness and its implications for law

Let me wrap up this chapter by briefly considering the status of law in Badiou's generic orientation on grounds of this presentation of the main points of his political thinking.[59] Livingston argues that there is "a profound, deep, and far-reaching structural homology between Badiou's generic orientation and the criteriological [constructivist] orientation that he most vehemently argues against, in *Being and Event* and elsewhere" (Livingston, 2012, p. 254). This structural homology is sourced in the metalogical preference that *both* constructivism and the generic orientation share: the preference of consistency and incompleteness over inconsistent completeness. Classical forms of constructivism, such as Russell's theory of types or Tarski's theory of metalanguage, seek to secure the consistency of a language by taking a leap to the metalevel, *and are satisfied with this hierarchy*. Badiou, by contrast, and crucially for the autonomy of the generic position, seeks to show the thinkability of truths unknowable in extant languages. The homology between classical constructivism and Badiou's generic orientation is not surprising, given that both accept the interdiction of paradoxical self-reference, although Badiou limits this interdiction to the domain of ontology determined by ZFC set theory only. "[B]oth orientations are committed to preserving consistency" (Livingston, 2012, p. 255), which is why Badiou's position can be seen as a sort of "constructivism+."

Badiou's extensional count-as-one regards, to take one of his own examples, Québec as "motley as this collection may be — Indians, Parti Québecois, blizzards,

[59] Bosteels provides an account of Badiou's understanding of the political event as "the force of nonlaw" that considers texts, in particular *The Theory of the Subject* and its critique of Lacanian psychoanalysis, that we have not touched upon here (Bosteels, 2008).

Anglophones, sled dogs, hydroelectric plants, maple syrup, Montreal's universal expo…" (Badiou, 2009, p. 307) and attributes consistency to this multiple when one can unambiguously say that an element either belongs or does not belong to the set "Québec." The metastructure (or in Badiou's later terms, "the transcendental") then legislates how these presented beings relate to one another. Commentators have argued, however, that it remains entirely obscure from where the objective count-as-one originates and "who" does the counting (see e.g. Johnston, 2008, pp. 354-355; Livingston, 2012, p. 244). Badiou wants to do away with all references to a subject or a self as the origin of the counting. This is evident in his later "objective phenomenology" in *Logics of Worlds*. In ontology there are no agents who count. As one commentator argues: "mathematics requires no interpreter; the count is accessible and true for all according to the logic presented; the count is im-personal" (Trott, 2011, p. 84). There is always some law of membership that forms the set as a multiple of multiples, but, it seems, *no legislator*.

This emphasis on "objective" (mathematically determinable) hierarchical order that axiomatically forbids self-reference thus excludes in the very first theoretical step the theorization of self-referential totalities, such as the legal system, as the "agents" that are "responsible" for social ordering. By taking consistency as the first theoretical value thus makes it difficult to appreciate a central feature of modern law: its claim to autonomy and, by implication, self-reference. It seems, however, difficult to renounce the observation that modern law sovereignly (and inconsistently) claims that it *itself* draws the limit between itself and non-law, between what belongs to its domain of operation and what not. It includes itself within the domain of its own operation, thereby being both inside and outside itself, giving rise to the inclosure paradox. The legal system seems like a perfect example of language seeking to express, in linguistic expression, its own limits (see Livingston, 2012, p. 36). Bypassing of this observation in fact oddly puts Badiou's account of law in the company of the traditional theories of law, such as the natural law theory, that in different ways share the primacy of consistency and endeavor to formulate metalanguages with which to guarantee the consistency of positive law from the outside, at a metalevel.

The claim to autonomy clearly breaks with the interdiction of self-belonging. Badiou's "objective phenomenology," which precisely excludes all "selves" as centers of orders, cannot possibly think of reflexivity — that a legal collective claims that an order is its own order — *within (social) ontology*: reflexivity is, for Badiou, a unique mark of "the faithful subject" who *breaks with* ontology. Reflexivity that set theory interdicts returns with Badiou's desire to show the incompleteness of ontological orders and that there are truths that declare *themselves* against a framework within which they cannot be heard. Badiou's reflexive politics is, thus, in a sense post-juridical: affirming itself against a domain from which reflexivity is constitutively excluded. Reflexivity and paradox are, for Badiou, marks of the truth and the truth procedure, which can take place only in science, politics, art and love.

Furthermore, Livingston argues that Badiou does not represent correctly much of the philosophy after the so-called "linguistic turn," the new focus in philosophy and the humanities on language and its structures as mediating our access to reality,

exemplified by Wittgenstein and his notions of language games and forms of life. According to Livingston, Badiou unfairly subsumes all philosophy of language under the heading of constructivism as the thinking of the One (linguistic) structure that rules over all reality sovereignly. In Livingston's argument, Badiou does not see that his position rests on the metalogical choice between consistency-incompleteness and completeness-inconsistency, and that what he labels as constructivism is, in fact, the "common enemy" to both his project and the project of paradoxico-criticism represented by late Wittgenstein, Derrida, Agamben, and others. (Livingston, 2012, pp. 238-268)

Norris argues, with Badiou, that:

> [w]here language or the normative appeal to language enjoins us to accept what is presently sayable, describable, or representable as *fixing the ultimate scope and limits of truth or intelligibility[,]* mathematics on the contrary allows — indeed requires — that we surpass those limits and conceive what may extend that scope beyond anything yet achieved or remotely envisaged. This it does through the presence of those various anomalies, conflicts or unresolved dilemmas that will always exist so long as mathematics remains a live and intrinsically a problem-solving activity of thought. (Norris, 2009, p. 68, my emphasis.)

However, as Livingston convincingly argues and as we have seen in our discussion of paradox in law and the shortcomings of constructivist-criteriological orientation (that seeks to prohibit the paradox) in its dealings with law, such self-referential totalities are precisely *not* capable of fixing their limits in any ultimate sense: they seek to do so, but always fail. A distinction must be drawn between criteriological-constructivist attempts at providing a metalanguage (Russell's theory of types, Tarski's meta-language, Kelsen's basic norm traditionally interpreted) that precisely seek to construct clear objective and consistent limits of a language, and the *paradoxico-critical* recognition of the inclosure paradox that these attempts cannot solve and that requires another approach to the problem of limited orders. In the next chapter, we turn to our last theorist, Hans Lindahl, to explore a paradoxico-critical position that seeks both to break with constructivism in Badiou's sense and to present a political theory of law that avoids nihilism.

6. Toward a non-nihilistic notion of the paradoxical legal order: Lindahl on law as restrained collective self-affirmation

6.1 Introduction

After Agamben's and Badiou's two different but in some sense "post" or "extra-juridical" accounts of politics, let us now end our investigations into legal totality and paradox with an aspiring, non-nihilistic theory of the paradox that seeks to articulate the paradoxical limits of the legal totality as a site of politics.

A strain of thought flows through Hans Lindahl's theory of law as "institutionalized and authoritatively mediated collective action" (Lindahl, 2018, p. 1), also called "the IACA-model of law," and forms its core. This strain consists of different formulations of the legal paradox: the paradox of constituent power, the paradox of representation, the paradox of recognition and the paradox of authority. In this chapter, I follow this thread to interpret Lindahl's legal theory as a paradoxico-critical orientation to the legal paradox. My aim is not to provide a final answer to the problems of totality and paradox. I aim merely to show that Lindahl's theory of the legal paradox offers an alternative to Luhmann's evolutionary constructivism as well as to Agamben's and Badiou's post-juridical politics, one that makes the metalogical choice in favor of the inconsistent totality but also insists on the possibility of a politics of law.

I take my cue from Lindahl's idea that legal orders always correspond to a perspective of a legal collective, of a "we," and that they are, hence, forms of *collective self-preservation*. Lindahl himself presents his notion of modern self-legislation as *restrained* self-preservation in opposition to Martin Heidegger's diagnosis of modern self-legislation as nihilistic. I seek to show that while Agamben's and Lindahl's formal analyses of the legal paradox are somewhat similar — they both articulate its logic of inclusion and exclusion — the decisive difference is how they conceive of relation of the collective self to its Other, and how they thereby come to different accounts of modern legal nihilism.

For Agamben, as we have seen, the paradoxical form of modern law and politics is exposed in the state of exception that allows legally unmediated sovereign dominance and violence of what is deemed to be "the Other": feeding on the Other in order to preserve oneself. This is the core of the diagnosis of modernity as nihilistic. When social orders, legal orders included, lose their transcendent grounds that used to justify them and give them meaning beyond their mere functioning, their lack of grounds drives them to a certain absolutization of their own perspective. What is Other loses all restraining power on the self. While Lindahl recognizes the dominance and even the destruction of the Other as a possibility inherent in the notion of self-preservation, he seeks to show that to conceive of self-preservation merely in these

terms is reductive. The notion of *restrained self-preservation* aims to provide a non-nihilistic vision of our legal present and show how legal collectives are also capable of restraining themselves in order to preserve, not to destroy, the Other. I will also seek to show that Agamben's notion of impotentiality positively resonates with Lindahl's account.

By rethinking law as a species of collective action, Lindahl provides a notion of law that is irreducible to state law. He aims to encompass with his IACA-model of law novel forms of so-called "global law" (such as the World Trade Organization (WTO), the Basel Committee for Banking Supervision, the Accounting Standards Board or the Clean Clothes Campaign), but also such social movements as the Zapatistas, the Vía Campesina, the Indian Karnataka State Farmers' Association (KRRS) or Occupy Wall Street, as well as indigenous collectives such as the U'wa people and Australian aboriginals (Lindahl, 2019c; Lindahl, 2018, pp. 22-28, 40, 165-177; Lindahl, 2013, pp. 58-64, 258). Lindahl suspends the traditional state-centered concept of law and seeks to put it to new use, one that would be capable of accounting of our normative present and conflicts over the normative form of collectivity. In a sense, Lindahl *universalizes* the notion of law and legal authority to span across the social field, but emphatically not in terms of a single universal legal order that would realize justice and freedom for all. Rather, his paradoxical account of the legal order and the legal collective seeks to show how each process of legal unification is simultaneously a process of political pluralization.

6.2 Modern rationality as self-preservation and the reoccupation of the question of the *nihil*

If it is true, as Agamben says, that "[t]he correct interpretation of a concept or a theory depends on the preliminary comprehension of the problem that it is meant to confront" (Agamben, 2013a, p. 92), then I wager a preliminary comprehension of Lindahl's theory of law: at the most general level, the problem it confronts is that of modern rationality as *self-preservation*. Lindahl follows the work of the German historian of ideas Hans Blumenberg to argue that the predicament of Western modernity is how to deal with *contingency*, namely with "the problem *that* there is a world and *what* it is as a world" (Lindahl, 2018, p. 4). When the pre-modern theological understanding of the world as created and conserved in existence by God loses its plausibility as humanity's self-interpretation, Western humanity becomes, in this new existential loneliness, face to face with itself and understands "the ordering of society [...] as a *self*-ordering." "Crucially, the problem of the *ground* of legal orders and of their boundaries becomes urgent in light of the contingency of social orders: how can a legal order justify that it includes this, while excluding that?" (Lindahl, 2018, p. 4, original emphasis.) Lindahl aims to show that although this problem leads to paradox, it *need not lead to nihilistic relativism*, to the mere affirmation of the positivity of contingent, groundless social orders.

Blumenberg suggests that this modern form of rationality as self-preservation is a new answer to a problem that was first articulated in the Middle Ages:

> The Middle Ages left behind a question of which antiquity was unaware[.] In the face of the entire stock of ideas which it had received from ancient metaphysics, the Middle Ages forced itself *to conceive of nothing, or the void* (*nihil*), almost as the normal metaphysical state of affairs and to think of the creation from nothing as a miracle continually effected against this normality. (Blumenberg, 1983, p. 218, cited in Lindahl, 2008, p. 331, my emphasis.)

Why is there something rather than nothing? The medieval answer to this question of the *nihil* was, in Blumenberg's and Lindahl's interpretation, *contingency* understood as "the dependence of the world on God for both its creation and its preservation from nothingness" (Lindahl, 2008, p. 331; Lindahl, 1995, p. 182). The human world was understood as created and preserved from nothingness and destruction *transitively*, by the Other conceived of as a transcendent Being beyond our world. In modernity, this theorem of transitive or heteronomous conservation "is reoccupied by *intransitive* conservation, that is, self-conservation or self-preservation" (Lindahl, 2008, p. 331, original emphasis; see also Lindahl, 1995, p. 182). The old question of the *nihil* remains, but it receives a new answer. Conservation of humanity from nothingness now means that human activity is, first, dependent on a pre-given world not of its own making. Second, human activity is also understood as a positive force, since it "suppl[ies] the form of what it realizes" (Lindahl, 2008, p. 331). According to this *reoccupation theorem*, human activity is dependent on existence and a world it did not create, but it is also a productive force that gives form to them. Such a conception of the two-foldedness of humanity, its "conditioned production or dependent spontaneity" (Lindahl, 2015, p. 165, referring to Kant, 1987, B72), reoccupies the medieval thesis of dependence on God of the created being for its existence and preservation in existence. The theorem reformulates the answer to the problem of the *nihil*. On the one hand, humanity exists in the world not of its own making and thus faces the sheer existence of a world, the fact *that* there is a world rather than nothing. On the other hand, human activity can influence *what* this world is as a world, what kind of an order the existing world takes.

Thus, for Lindahl, modern philosophical and political thought can be understood as a reoccupation of the medieval question of the *nihil* and supplying an answer to this question in terms of a process in which humanity confronts its Other, a strange, non-human world and turns it into a familiar, human one. According to Lindahl, much of modern political thinking understands political freedom as such a double movement of destruction and construction:

> If humans are initially given over to a world that appears as binding to them and as determining the scope of their possibilities (heteronomy), the initial, destructive moment of freedom consists in rendering the extant world order non-binding and determinable for human action. In its second, productive

> moment, human action determines the determinable giving it an order that meets the condition of non-contradiction (a universal law). (Lindahl, 2015, p. 165)

Karl Marx's account of the Communist revolution exemplifies this conception of destructive-constructive freedom that realizes a universal human order. The critique of capitalism deploys the destructive moment that unbinds the seeming necessity of the alienating capitalistic world on laboring humanity, and the positive moment of the revolution then brings forth a novel human order free from the contradictions of the old one (Lindahl, 2015, pp. 165-166). The quintessential modern notion of political freedom, that of *constituent power*, is then understood precisely as an activity of bringing forth, on grounds of an unbinding of the political collective from what is alien to it, a *universal, fully human and contradiction-free* order. To self-legislate and to preserve oneself means becoming autonomous: unbinding oneself from the given and initially alien world and re-making it in one's own image.

Here begins Lindahl's critique of this interpretation of modern political freedom and constituent power. For Lindahl, modern political philosophy presupposes a conception of the political subject that ultimately possesses a "capacity to overcome the *nihil* by integrating the strange — without a remainder — into the unity of its own world" (Lindahl, 2008, p. 334). The *nihil*, that what is non-human and resists human endeavors, is put under the sign of provisionality, as something to be overcome by constituent power in the gradual realization of universal political freedom. The sheer existence of a world and its *inappropriability* in human terms is lost:

> The negative moment of freedom consists in leveling down the strange to the factuality of what merely exists, such that, deprived of its binding character, the real becomes the point of departure for the positive moment of freedom, namely, the enactment of a universal order. Accordingly, the strange or alien manifests itself as *the ultimate danger that human being could lose itself*; that, no longer recognizing itself in the made of its making, the subject forfeits its primordial ontological productivity and its capacity to *assert itself against what opposes its continued existence in being*. (Lindahl, 2015, p. 171, emphasis mine.)

The understanding of self-preservation provided by modern political thinking is then about overcoming negativity: overcoming the strange as what poses a danger to the continued existence of the self. Self-preservation is conceived of as a process of effacing the subject-binding strangeness of the sheer existence of the world and turning it into a fully human world under the sign of the universal law of human freedom. So, on the one hand, modernity is marked by the loss of God, the loss of transitive conservation of humanity against the threat of nothingness, and this loss forces modern society to answer to this threat in a novel way, as intransitive conservation or self-preservation. This modern idea of rationality as self-preservation

is expressed, Lindahl notes, in Spinoza's *conatus*: "Each thing, as far as it can by its own power, strives to persevere in its being" (Spinoza, 1988, Part III, Proposition 6, cited in Lindahl, 2020; Lindahl, 2008, p. 330). However, this rationality as self-preservation has been articulated in modern political thought and in the notion of constituent power in such a manner that seeks to definitively exclude the fact of the world and its mere givenness and strangeness, and make the world fully "our own," a "fully humanized order" (Lindahl, 2015, p. 171).

In our terms, the reoccupation theorem expresses the main features of the constructivist-criteriological orientation to totality and paradox. In Lindahl's analysis, contemporary forms of *political universalism*, such as that of Jürgen Habermas and Seyla Benhabib, are late representatives of this understanding of strangeness as waiting to be overcome in a universal legal-political order of full inclusion of all humanity. As we already shortly discussed in the Introduction (1.3.4), legal universalism is the position that brings "parameterization" into political and legal theory, with the aim of developing a metalanguage with which to guarantee the consistency of a legal-political totality. The idea is precisely to seek to avoid foundational paradoxes, to reject the view that legal and political orders function on contingent and not fully rational and justified grounds. Legal universalism postulates the ideal of an all-inclusive legal order, like a global order of legal human rights, that would offer universal standards that all legal authorities ought to observe. The philosophical core of this position is that all legal limits that include some but exclude others can be overcome in the process of progressing toward the regulative ideal of an all-inclusive order. "Even if its arrival is forever postponed in historical time, progression toward a legal order that would include without excluding must be postulated as the telos of an authoritative politics of boundaries, holds the legal universalist, if globalisations are to be more than arbitrary processes and if relativism is to be held at bay" (Lindahl, 2018, p. 283). The authoritativeness of legal authorities, their normative legitimacy, is, according to universalism, grounded on including the individuals and groups that legal orders have previously excluded.

Lindahl's different take on the paradox of legal orders is made visible in his critique of legal universalism. He aims to show that even if legal orders premised on the state and its territorial borders no longer possess the paradigmatic status they used to, no legal order claiming global validity is unlimited. No global legal order, not even human rights law, is unlimited and capable of including without excluding at the same time. Furthermore, legal universalism does not grasp that, at times, it is inclusion into law that is the problem rather than the solution (Lindahl, 2013a, pp. 227-234; Lindahl, 2018, pp. 207-224, 228-285). For example, the U'wa people in Colombia demand not inclusion into the Colombian state and international human rights law, but rather exclusion from them (Lindahl, 2013a, pp. 58-64). This suggests, for Lindahl, that the authoritativeness of legal authority cannot hinge on the progress of gradually eliminating all forms of exclusion. All legal orders, ranging from normative orders of Indigenous Peoples to state law, international law and global legal orders, are bounded: they both include and exclude, necessarily. Their functioning rests on a constitutive closure (or rather, as we will see, a process of opening up and closing

down). Therefore, legal theory must look at the logic of boundaries (Lindahl, 2018, p.283), and how inclusion and exclusion do their work in making legal orders and legal collectives possible. Unlike Luhmann and Agamben, Lindahl devotes a lot of time to show that the logic of bounded orders also has normative implications for legal authority. To acknowledge the irreducibility of exclusion does not commit one to nihilistic relativism that offers no tools to address unjust forms of inclusion and exclusion and simply accepts the status quo, or so Lindahl argues.

This analysis could be read as showing the significance of inventing metalanguages for overcoming the paradoxical double-bind at the core of human existence: its being undecidably riveted to both passivity and activity, the fact of existence and identity, strangeness and ownness. It is against overcoming this undecidability by metalanguages and the formulation of constituent power as suppressing this passivity, the fact of existence and strangeness that Lindahl proposes his paradoxical formulation of constituent power: a paradoxical formulation that seeks to show how self-preservation is not about the preservation of the self at the expense of the strange, but rather structurally tied to strangeness and incapable of overcoming it. But we have some mileage to do before going to the analysis of Lindahl's paradox of constituent power in detail (see 6.6). Let us now investigate how the modern conception of freedom as the full humanization of the world has itself been forcefully and influentially criticized by Martin Heidegger as an expression of *modern nihilism*.

6.3 Heidegger, Schmitt, the secularization theorem and modern nihilism

Lindahl presents Blumenberg's analysis of modernity as an alternative to Martin Heidegger's and Carl Schmitt's respective philosophical and political analyses of modern reason as based on secularized theological concepts. With Blumenberg, Lindahl opposes the view "that modern subjectivity, as both Heidegger and Schmitt suggest, is a transposition of the theological *causa sui,*" that modern rationality is a mere secularization of theological concepts (Lindahl, 2008, p. 330). As Agamben explains the secularization theorem:

> [secularization] leaves intact the forces it deals with by simply moving them from one place to another. Thus, the political secularization of theological concepts (the transcendence of God as a paradigm of sovereign power) does nothing but displace the heavenly monarchy onto an earthly monarchy, leaving its power intact. (Agamben, 2007, p. 77)

The idea that modern political concepts are secularized theological concepts has been critically identified, by both Heidegger and Agamben, as exemplifying modern nihilism and the loss of collectively binding values and tasks. What Lindahl ultimately aims at is a non-nihilistic analysis of modern rationality as self-preservation, and the critique of the secularization theorem helps to reach this aim.

Blumenberg's reoccupation theorem shows the beginning of the way to this project but does not yet achieve to bring it to an end. It only allows articulating the status of the *nihil* in modern political thinking as a negativity to be overcome, and, therefore, also ends up in a position described as nihilistic by Heidegger. To counter nihilism, the status of the *nihil* needs to be rethought not as something to be overcome toward a fully human humanity but as constitutive of the subject and ultimately inappropriable by it.

For Heidegger, modern nihilism consists of a double negation, of a sort of nullification of negation. The first negation is expressed by the Nietzschean argument of the death of God and the loss of binding values and goals. The second negation, or the nullification of the first negation, takes the loss of God to be a mere absence of foundation:

> "God is dead" [...] is to say [that] "Christian God" has lost his power over beings and over the determination of man. "Christian God" stands for the "transcendent" in general in its various meanings — for "ideals" and "norms," "principles" and "rules," "ends" and "values," which are set "*above*" the being, in order to give being as a whole a purpose, an order, and — as it is succinctly expressed — "meaning." Nihilism is that historical process whereby the dominance of the "transcendent" becomes null and void, so that all being loses its worth and meaning. (Heidegger, 1991b, p. 4, original emphasis.)

In Lindahl's interpretation of Heidegger's account of nihilism, modernity reacts to this loss of transcendence, meaning and purpose by secularizing God, elevating humanity into the position that was left empty. The loss of the transcendent Being means that the now-empty theological *causa sui* can be secularized, transposed into the human subject. The human being who in medieval thought was the created being now assumes autonomy and becomes the ultimate self-creating creator, *causa sui*, the self, the *ego cogito* on whose acts of thinking that what is thought about, the *cogitata*, depends as its foundation (Lindahl, 2008, pp. 325-327, referring to Heidegger, 2002; Heidegger, 1991a). As a result, reality appears for such a subject as something to be appropriated, as something that is constantly available for the human being and his activities and as existing for his sake only:

> Modernity secularizes salvation-certainty because self-legislation posits the world as the domain made available for the subject's unconditioned self-security. In short, and summing up Heidegger's argument, the "self" of modern self-legislation stands for the claim that human being is not only the self-positing foundation of all being but *also the being for the sake of which all other beings ex-sist as available for the self's purposes*, whatever these may be. Nihilism has become the destiny of modernity because the subject's demand of autonomy crowds out a transcendent pole, a heteronomy constitutive for human being and its relation to the being of beings. (Lindahl, 2008, p. 327, my emphasis.)

In Heidegger's analysis, the loss of the transcendent is not lived in modern nihilism as a confrontation with a void, but rather as an absolutizing of the human subject, making the subject into a secular god. According to Heidegger, this nihilism defines modern thinking, science and technology, but also, as Carl Schmitt's constitutional theory shows, the understanding of politics and law. As Hannah Arendt trenchantly puts this Heideggerian critique of modern nihilism: "The modern age [...] has led to a situation where man, wherever he goes, encounters only himself" (Arendt, 1993, p. 89). Or as Agamben puts it, in a passage we cited already above: nihilism "interprets the extreme revelation of language in the sense that *there is nothing to reveal*, that the truth of language is that it unveils the Nothing of all things. The absence of metalanguage thus appears as the negative form of the presupposition, and the Nothing as the final veil, the final name of language" (Agamben, 1999, p. 46, my emphasis). When there is nothing to reveal, language recoils onto itself and speaks of nothing but itself.

In Schmitt's thinking, the secularization theorem is visible in his theory of sovereignty and constituent power. In Lindahl's interpretation, for Schmitt, "the people is a subject in the strong metaphysical sense predicated by Heidegger, namely, the unconditioned bearer — *sub-iectum* — of a dependent being — the legal order" (Lindahl, 2008, p. 328). The created being – a legal order or a constitution – expresses democratic self-determination only to the extent that the people takes the empty place of God and becomes the unconditioned foundation of the worldly order, namely law. In modern democracy, the people preserves itself in existence by giving itself its own law and maintains in its own hands the ultimate power to change this law at will. The absolute Being that was conceived in pre-modernity as transcendent to the world, now manifests itself in a fully immanent manner, as the democratic identity of the rulers and the ruled and as the non-representable, immediate popular will (Lindahl, 2008, pp. 327-330; referring to Schmitt, 2005; Schmitt, 2008; Schmitt, 1985). Thus, "[t]he passage from transcendence to immanence implies, in Schmitt's view, that the democratic legitimacy of the law ultimately rests on the possibility that the people be *immediately present* to itself as the homogeneous political unity that enacts the law, and for the sake of which the law is enacted" (Lindahl, 2008, p. 229, original emphasis; see also Lindahl, 2007a; Lindahl, 2015, p. 165). Although Schmitt does recognize the necessity of representation of the people for the existence of a state, he does seem to understand representation as a sort of mirroring a prior, already extant popular identity (Schmitt, 2008, pp. 240-242). "The idea of representation," he writes:

> *rests on a people existing as a political unity*, as having a type of being that is higher, further enhanced, and more intense in comparison to the natural existence of some human group living together. If the sense for this peculiarity of political existence erodes and people give priority to other types of their existence, the understanding of a concept like representation is also displaced. (Schmitt, 2008, p. 243, my emphasis.)

As we will see below, it is this immediacy to itself of a collective existing prior to its representation that is another important target of Lindahl's reworking of the theory of collective self-preservation as necessarily represented and therefore always mediated.

The secularization of theological transcendence fills the void left by the "death of God" with the positive orders that originate in the subject conceived as absolute and self-present. According to Heidegger, this prevents the authentic thinking of the void, which for him concerns the nothing as the "Being of beings."[60] The formula of nihilism, according to Heidegger, is that "there are only positive worlds [of science, of law, of politics] and nothing besides them" (Prozorov, 2013a, p. 91). As Lindahl puts it, for Heidegger:

> the progressive articulation of the principle of autonomy, in modernity's philosophy, science, culture, art, and *a fortiori* its politics and law, consists in the progressive accomplishment of European nihilism. "Secular theology," in its fundamental epochal significance, is nihilism itself: "the essential nonthinking of the essence of the nothing." (Lindahl, 2008, p. 324, citing Heidegger, 1991b, p. 22)

It is to counter this assessment of modern self-legislation and self-preservation as nihilism, in which what does not fall within a positive world simply counts as nothing, that Lindahl seeks to formulate an alternative account of modern law, self and its relation to the *nihil*, to transcendence and the strange. It could be said that at play are two different analyses of what the *loss of metalanguage* means for modern social ordering. The loss of God as the metalanguage that held values and norms, aims and purposes of society in place leads, in the Heideggerian analysis, to the transposition of the function of metalanguage to social immanence. As we discussed in the Introduction, the function of a metalanguage is always to seek to offer a stable ground for an order that is itself incapable of doing that. The need for a metalanguage arises from understanding the lack of grounding as a threat to the preservation of the order. A self that has been conceived in the image of an absolute being, seeks to make itself consistent by overcoming what is other to it and by positing as its goal the full effacement of that other. By embracing a paradoxico-critical orientation to paradox, Lindahl seeks to show that metalanguages (both Habermasian universalism of full inclusion and Schmittian absolutization of constituent power/the sovereign) cannot achieve what they are designed for, and that to see the dependency of a social order on what it cannot order as a mere threat to its existence is reductive. "The strange" need not necessarily be understood as an enemy to be eliminated.

Agamben's critique of the paradox of sovereignty shares important similarities with Lindahl's account. However, its analysis of modern law and sovereignty sees in them an absolutization of the government of life, with little space left for a politics of law. For Agamben, the task of "messianic politics" is to bring the whole Western legal-

[60] In Heidegger's fundamental ontology, Being as such is itself no particular being or thing, it is quite literally no-thing, the void in which beings appear as the beings they are (see Heidegger, 1962).

political apparatus to an "end." While Lindahl seeks, beginning with contesting the secularization theorem, to build an account of legal authority and collective self-preservation that does not forfeit the possibility of ethics, for Agamben, sovereignty and law in the age of modern nihilism harbors no such possibility. For Agamben, the only possibility for overcoming nihilism is to think about politics beyond modern law. At stake are ultimately different understandings of the possibility of political change in law.

To set the Blumenbergian theorem of reoccupation against the secularization theorem opens, or so Lindahl argues, an alternative angle to modern law and politics, namely one that focuses on how any formation and preservation of a "self" is dependent on what is "strange" to the self and that remains, ultimately, *inappropriable* by the self. Whereas both Habermas and Agamben see the modern collective self as something unbounded and universalizable (for Habermas, unbounded because all forms of exclusion can be overcome; for Agamben, unbounded because the limiting factor, law, suspends itself permanently to the benefit of mere governance of life), for Lindahl, the collective self is finite and bounded. My interpretation of the Lindahlian challenge of both Habermasian universalistic teleology and Agambenian nihilistic diagnosis of modern legal rationality is based on this idea of the inappropriable. In some respects, this comes close to Agamben's own "positive" account of politics, as we will see.

6.4 Law as a concrete order

Let us begin with Lindahl's account of law as a *concrete order* and see how this account of law resists the reduction of law into a mere suspended form.

At the beginning of the first edition to his *Reine Rechtslehre*, Kelsen notes that legal norms have four "spheres of validity": spatial, temporal, material and personal. Legal norms, he observes, regulate human behavior in these four spheres. They determine *whose* and *what kind* of behavior is regulated, as well as *where* and *when* it ought to take place (Kelsen, 2002, pp. 12-13). In *Fault Lines of Globalisation*, Lindahl takes this change of perspective that Kelsen intimated, although never fully thought through, as his point of departure for the redefinition of the notion of law (Lindahl, 2013a, pp. 13-15). Unlike Kelsen, who does not develop his own insight into law as a *concrete order of behavior* — law as *parole*, we might say — and goes on to define law as a unity of norms — law as *langue* — Lindahl proposes to turn the theoretical lens from norms to the behavior that they regulate. What would it mean to think about the *unity of law* not in terms of (hierarchies of) norms but from the perspective of those whose behavior law regulates in the four spheres? (Lindahl, 2013a, p. 16)

Lindahl thus attempts to rethink the notion of legal order and law's unity precisely in concrete ("non-suspended") terms. This theoretical turn requires postponing the reductive move that legal theorists have typically made, insofar as they

have focused on law as *langue*, as a *system of rules*, or norms, and forfeited the occasion to analyze law's concrete, gathering power that is manifest to those whose behavior it regulates, that is, to those engaged in joint action under law. This change of perspective in legal theory echoes Heidegger's critique of Western philosophy as trying to explain reality single-mindedly as a totality of discreet, context-independent and thematically present objects standing vis-à-vis a disinterested subject observing the reality theoretically. For Heidegger, philosophy has lost from its sight the fact that prior to any theoretical thematization, we "encounter" the world and its things as something "available" and "ready-to-hand" (*zuhanden*) for us, as something that "concern" us and with which we are practically engaged (Heidegger, 1962, pp. 91-95). Lindahl's claim is that things are not so different with regard to law: it is also "primordially" encountered as something with which we are practically involved.

Lindahl's analysis resonates with Heidegger's on this point:

> [A] legal order is not first and foremost the unity of a manifold of norms and only derivatively a spatial, temporal, subjective, and material unity. To the contrary: isolating legal norms as the object of the question about the unity of legal order comes second, as a historically late doctrinal and theoretical achievement. (Lindahl, 2013a, p. 7)

Law, in its "primordial" sense, Lindahl argues, lets individuals orientate themselves toward each other and the world around them in specific ways (Lindahl, 2013a, p. 122). Law as a concrete order makes space, time and things available, "ready-to-hand," to use Heidegger's expression with Lindahl's explicit permission, in particular ways to those whose comportment it regulates (Lindahl, 2013a, pp. 124-125). Importantly, in regulating behavior in temporal, spatial, material and personal dimensions, a legal order gives rise to the *first-person plural perspective of a "we*." It appears (or rather may appear; I come back to this) as "our" order, in the sense that it regulates the mutual behavior of those it engages: "our" reciprocal action. A legal order that regulates behavior in the four dimensions opens a realm of practical possibilities for a manifold of individuals, who can thereby come to orient themselves not only toward the world and its things in specific ways, but also toward each other. For Lindahl, like for Luhmann, a legal order in place stabilizes expectations of expectations of conduct, but unlike Luhmann who conceptualizes the stabilization of expectations in terms of communication, Lindahl develops a theory of law as a species of *collective action* in time and space. As Lindahl himself puts it, "whereas systems theory would refer to a 'process of communication,' a first-person plural account of legal order sees an interlocking web of individual acts – participant agency – the unity of which is intelligible in terms of the normative point of joint action" (Lindahl, 2013b, p. 710).

A defining aspect of Lindahl's theory of law as "institutionalized and authoritatively mediated collective action" (Lindahl, 2018, p. 1) is, thus, the significance for theory of describing law in its dimension of a concrete practical order of behavior. This distinguishes Lindahl's account from traditional legal positivism. Unlike Kelsen who insists on the "purity" of legal methodology and legal knowledge

and excludes as sociological investigations into how law concretely shapes practices in society, Lindahl seeks to integrate into legal theory an account of how law's power concretely regulates, at the level of embodied experience and spatial and temporal conduct, subjects' orientations in the world, toward its entities and each other.

In this sense, his approach has affinities with Michel Foucault and Agamben who are interested in analyzing how "a set of practices, bodies of knowledge, measures, and institutions that aim to manage, govern, control, and orient — in a way that purports to be useful — the behaviors, gestures, and thoughts of human beings" (Agamben, 2000, p. 12). Foucault famously rejects from his analysis of "governmentality" what he thinks is the form of power pertaining to law. Foucault sees law as an overwhelmingly negative power, that is, as a power of prohibition, whereas what interests him is the *positivity* of power, its productivity (Foucault, 1980, p. 102, footnote 4; Foucault, 1998, p. 85, 90). The Foucauldian distinction negative/positive, or prohibitive/productive, is, indeed, quite different from the notion of positivity of positive law as something "posited" and in opposition to normativity considered "given" or natural. In modern theories of legal positivism since Austin, the defining mark of positive law is, of course, its origin not in natural law or other forms of non-legal normativity but in the legal procedure in which it has been posited. The relevant distinction is that between legal and moral norms, or positive and natural law.

However, in his essay "The Truth in Legal Positivism," John Finnis scratches the surface of the genealogy of the notion of positive law and notes that in his use of the term, Thomas Aquinas "asserts and illustrates positive law's variability and relativity to time, place, and polity, its admixture of human error and immorality, its radical dependence on human creativity, its concern for what its subjects do rather than their motives for doing it" (Finnis, 1999, p. 195). Even if "positivity" means that law has been posited in deliberate human action, in distinction to given laws of nature and natural rights, the social origin of law is seconded by law's intimate relation to time, place, community and regulation of overt, concrete behavior. Positive law is not merely about commands but also about the *constitutive rules* of a collective praxis. Finnis goes on to note that in early Aquinas' discussion of the religious practice of fasting, fasting is conceived as a religious obligation and, thus, pertaining to natural law, but it is the task of positive law to determine the times and rations of such abstinence (Finnis, 1999, p. 198). The conclusion of Finnis' reading is that for Aquinas, positive law is about determining in concrete, spatial and temporal terms how the abstract obligations of religious natural law ought to be realized as a concrete, religious practice (Finnis, 1999, p. 199). Explicit positing of a norm is about creating a concrete *disposition* for the addressees so that they can concretely realize their religious and moral obligations and virtues.

In his famous essay "What is an Apparatus?," Agamben traces, in an imaginative genealogy, Foucault's use of the notion of *dispositif* back to the writings of the latter's teacher Hippolyte on the young Hegel's distinction between "natural religion" and "positive religion." According to Agamben, "[w]hile natural religion is," for Hegel, "concerned with the immediate and general relation of human reason with the divine, positive or historical religion encompasses the set of beliefs, rules, and rites

that in a certain society and at a certain historical moment are externally imposed on individuals" (Agamben, 2000, p. 4). Positive religion posits norms and imposes them on individuals who, furthermore, "internaliz[e them] in the systems of beliefs and feelings" (Agamben, 2000, p. 6). What the notion of "positivity," then, marks for the young Hegel and later for Foucault, according to Agamben, is "the relation between individuals as living beings and [...] the set of institutions, of processes of subjectification, and of rules in which power relations *become concrete*" (Agamben, 2000, p. 6, my emphasis).

The notion of "positivity" can thus be read as both the contingent positing of law in acts of law-making and as a concrete productivity. It marks both the separation of power to legislate from the Divine, making the law contingent and historical, and the concrete arrangements that determine and enable certain practical possibilities for individuals, who may thereby become religious, or otherwise intelligible, subjects for themselves and others. "Positivity" of positive law can be understood to mean that modern law is about the emergence of contingent, posited orders that concretely, in time and space, regulate individuals' behavior by constituting, time and again, certain practical possibilities for them that, then, become to an extent "internalized," lived in the flesh, so to speak, and as a certain form of identity or social subjectivity.

In my reading, the "positivity" of positive law is, for Lindahl, about (re-)setting the legal boundaries – positivity as an act of positing – that constitute law as a concrete, practical, and limited order – positivity as a concrete order of behavior. Accordingly, there are, strictly speaking, no boundaries but rather *a fourfold (re)bounding process*: spacing, timing, subjectifying and materializing as the dimensions of a concrete ordering of practical, collective life.

In Lindahl's account, law orders space, time, subjectivity and contents of behavior. It selects, for instance, certain places as "ought-places," determining how conduct ought to be spatially articulated (Lindahl, 2013a, pp. 18-19). For example, if one wishes to cross the external border of the European Union, one ought to cross it at a legally appropriate point, like the airport. At the airport, for its part, one ought to enter and exit the specific ought-places "nesting" within it, like the security check and passport control, in the appropriate manner. Law also articulates behavior into temporal sequences, regulating what must be done first and what second (Lindahl, 2013a, pp. 20-21). If one wishes to enter the EU, one ought first to acquire all required documents, such as passports and visas, and only then seek to cross borders, again at the appropriate temporal order of, say, first entering the airport, then going through the security check, then the passport control, then boarding the airplane... By being in possession of all the appropriate documents, one shows that one fulfills the (in one's own case) relevant determinations given by the EU to the subject-positions of the border-crosser. Thereby, one is enabled to act as a border-crosser and a passenger, and relate to the acts of other legal subjects, like border-control authorities, airline personnel and other passengers. A legal order thus regulates subjectivity, as well (Lindahl, 2013a, pp. 21-22). Entering the airport, the security check, the airplane etc. are, furthermore, all contents of legal acts, different types of legal action that connect with each other in specific, legally determined ways.

In each dimension, spatial, temporal, subjective and material (i.e. act content), a legal order is about differentiating, or selecting, elements (places, times, subjectivities, act-contents) and interconnecting, or joining, them into a practical order (Lindahl, 2013a, pp. 18-22). To be sure, a legal order does "not simply coordinate pre-existent places, times, subjectivities and act-types" (Lindahl, 2018, p. 51), but they make sense only as elements of a single whole and in reference to each other. This ought-place here refers beyond itself to other ought-places, as well as to a certain temporal sequence of how a certain kind of conduct of specific legal subjects ought to unfold, which place ought to be entered first and which second. The practical meaning of each, such as the meaning of the place for passport control, depends on its being an element in the practical context. That a legal order is a concrete order means both that it "assigns the *appropriate* places and times for the *appropriate* subjects to do the *appropriate* things," and that all these dimensions refer to each other in such a way that only in a gesture of abstraction can they be discussed separately (Lindahl, 2013a, pp. 24-25, original emphasis).

This practical engagement that Lindahl, following Heidegger, calls "understanding," is a mode of legal *intentionality*: a mode of disclosing something as something. When I am moving through the airport to get to my flight, the airport is disclosed as a network of ought-places, I am disclosed as a passenger, and others as personnel or fellow passengers. Something is disclosed as something in reference to the totality of the practical order, in all its dimensions:

> in the very move by which a legal act differentiates by picking out something (even if it is a class of things or acts, as in the enactment of a statute) and disclosing it as something* [i.e. as somewhere, somewhat, somewhen, someone], it also interconnects by referring this something beyond itself, to other elements with which it belongs in the fourfold referential unity of a legal order. (Lindahl, 2013a, p. 128)

Furthermore, what Lindahl calls "the normative point of joint action" is "that what our joint action ought to be about," such as traveling across state and EU borders. It is toward a normative point that mutual expectations are geared. Such a point can be anything, from interests to values and principles, that is deemed to justify the action from the perspective of those involved in it (Lindahl, 2013a, p. 30). All the four dimensions play together to enable what it is that the collective is deemed to be doing together.

Indeed, a legal order is concrete not only the sense that it articulates space and time, but also in the sense that it forms a practical order from the perspective of those whose behavior it regulates (Lindahl, 2013a, p. 24):

> Law appears as a four-dimensional order in which, for example, *one finds oneself* in [the supermarket] Lafayette (place), as a prospective client (subject), in the course of (time) buying a bag of potatoes and other products (content). Only derivatively can a legal order be "objectified," that is, severed from this

> first-person perspective, with a view to either isolating the "meaning" of legal norms as the object of doctrinal analysis and "interpretation," or establishing from a theoretical perspective under what conditions a manifold of norms can be viewed as a legal unity. (Lindahl, 2013a, pp. 24-25, my emphasis.)

Insofar as law really is efficacious and succeeds in regulating behavior, it appears as a concrete practical order to those whom it enables to act in specific, articulated ways. *I* am empowered, by law, to act and orient *myself* in certain ways (rather than others) toward the world, its things and others around *me*. "[F]rom the perspective of [law's] addressees, [...] legal rules are signposts by which to orient *themselves* in space, time, subjectivity and act-types" (Lindahl, 2018, p. 137, my emphasis).

My first-person singular perspective is, furthermore, embedded in a first-person *plural* perspective. A legal order allows a manifold of individuals to coordinate their actions in definite ways, for example, by occupying the subjectivities of the passenger, airline personnel or the security guard, all comporting themselves appropriately toward each other and in appropriate space and time. Each of us engaged in that praxis expects that our expectations of which others will behave in a given situation, and how, where and when they will conduct themselves, will be satisfied (Lindahl, 2013a, p. 30). We are, thus, all, within the boundaries of our respective legal subjectivity, relating to that of others, and, thereby, *together* engaged in *joint action* under law. We all share, or rather are deemed to share (I come back to this "deeming"), the same expectations of how one ought to behave in the practical situation at hand, with regard to its spatial etc. dimensions, and we see (or are deemed to see) ourselves "as a group, that is, as a whole or unity the members of which ought to coordinate their action appropriately in the process" of the praxis in question (Lindahl, 2013a, p. 82). "That legal acts take place in the course of legal practices," Lindahl adds, "means that legal acts are structured as a *reiterative anticipation* (Lindahl, 2013a, p. 131, my emphasis): my act anticipates how it will be responded to by others; and it can so anticipate the future, because it reiterates past acts of the same type. I can pass through the airport and anticipate how others will respond to my gestures, because my behavior repeats what countless others have done before me.

For Lindahl, group identity can be understood both as *sameness* (members share the same expectations over time) and as *selfhood* (those who are involved see themselves as a group) (Lindahl, 2013a, p. 82). Collective selfhood means that normative expectations are not merely the same for each involved individual, but they are viewed as "our" expectations of who will act and where, when and how she will act. A legal collective can be identified, and identified over time, as the *same* collective, if the way in which it articulates the four dimensions of behavior and the apposite normative expectations remain relatively stable over time, and if the behavior of relevant parties keeps satisfying those expectations (Lindahl, 2013a, p. 84). By contrast, collective identity as *selfhood* over time requires taking care of reflexivity: of the mutual commitment to upholding the normative point and the four-fold legal order that is deemed to be the way to realize that point. Finally, the unity of a legal

order, the possibility to individuate a concrete legal order, depends on collective identity: "[T]he emergence of a legal order hinges on the capacity of the apposite collective to stick, by and large, to what are deemed to be its prior commitments about the who, what, where, and when of behaviour" (Lindahl, 2013a, p. 99).

We come back to collective selfhood in a moment but let us complicate the story we have been telling so far. For typically the sameness, and in particular the selfhood, of a legal collective is only "quietly at work" behind the scenes, so to speak. "The orderliness of the legal order shared by [participant agents] remains [normally; my addition] hidden from view, as does its subject-relativity" (Lindahl, 2013a, p. 89). For Lindahl, the point of departure for legal theory is law as joint action under a concrete legal order, but typically such practices as we have been describing are only *unthematically legal and collective*. Law concretely orders the behavior of those taking part in legal practice *without them explicitly identifying themselves as legal subjects undertaking legally ordered actions at a legally appropriate pace and in legally appropriate places*. Passengers typically simply orient themselves through the formalities at the airport, without reflecting on their legal nature, "even if, *ex post*, their behaviour can be shown to be legal and they can interpret it as such" (Lindahl, 2013a, p. 25). It is indeed remarkable that the very point of departure for legal theory is, for Lindahl, this practical engagement that is precisely *not* thematically legal. Its legality is "unobtrusive" for those who are thereby empowered to orient themselves in specific ways (Lindahl, 2013a, p. 25). It is this unobtrusive legal order that Lindahl calls "the *primordial* meaning of law as a concrete normative unity." The unthematized practical engagement is, furthermore, "the *primordial* sense of [legal] interpretation" (Lindahl, 2013a, p. 122, my emphasis).

We will have to take things gradually in order to understand and evaluate Lindahl's claim about "primordiality" of legal behavior that is only "unobtrusively legal." Let us first note that this at least means that law as a concrete order of behavior verges on normality and habituality:

> The coordination of behavior in the Galeries Lafayette [...] is habitual, almost "second nature" to the participants, such that they do not even think of coordinating their acts by reflecting on what one *ought* to do[.] By the same token, as long as behaviour is in accordance with mutual expectations, the first-person plural reference to a "we" deployed in each joint act whereby a client and Lafayette pull off a sales transaction remains more or less implicit; what we stand by — our mutual commitments — remains largely taken for granted. (Lindahl, 2013a, p. 85)

What one ought to do and how one habitually behaves are indistinct. There is little that a voluntarist description of the situation would grasp: "The closure of space, time, subjectivity, and act-content deployed in joint action usually remains a 'matter of course' for participant agents," they "uphold extant boundaries, although their behavior is not 'deliberately' oriented to doing so" (Lindahl, 2013a, p. 201). One simply behaves oneself as a "normal" person would in a situation at hand.

> In their involvement with others and with things, individual participants in a legal practice orient themselves spatially, temporally, subjectively, and materially by actualizing, *however implicitly and even anonymously*, the first-person plural perspective of a 'we' in joint action. (Lindahl, 2013a, p. 126, my emphasis.)

So, interestingly, a theory of law as "collective action" presents as "primordial," as authentically *legal and collective*, an experience that can be straightforwardly described neither as "collective" (but rather "anonymous"), as "action" (but rather "behavior") nor even as explicitly "legal" (but only unobtrusively so).

Lindahl calls this "pre- and post-reflexive anonymity of joint action in the mode of understanding" (Lindahl, 2013a, p. 136). In other words, *explicit* drawings of legal boundaries by legal authorities "sediment" when their addressees take them as premises of their behavior. Behavior is *post-reflexive*, and post-thematic, "in the sense of a normality that has consolidated itself as a result of the reiterated qualification and enforcement of behaviour that is deemed legal" (Lindahl, 2018, p. 405). But the relation between the habitual and the reflexive is not a one-way street of sedimentation. Explicit acts of indication of the legal collective and identification of its boundaries do not happen in a vacuum but rather as a response to an interruption of a legal normality:

> The hold of law *qua* normative order is at its strongest when it remains unnoticed as an order that opens up and closes down normative possibilities by differentiating and interconnecting four dimensions of behaviour. Yet more pointedly, while participants understand what it is they ought to do, they do not immediately describe it in specifically legal terms, even if, *ex post*, their behaviour can be shown to be legal and they can interpret it as such. This is important because it suggests that legal orders draw on and *come to stand out* against the background of a more or less anonymous form of normativity, a normativity in which interaction precedes the reflexive operation whereby a manifold of individuals refer to themselves as a "we" who act together, such that paying at the check-out point is simply what "one" does. This is not to say, however, that it is a normativity devoid of legality, for law has contributed to shaping these patterns of behaviour. (Lindahl, 2013a, p. 25, original emphasis.)

Lindahl speaks of the unobtrusive legal order of praxis as an anonymous social normativity (Lindahl, 2013a, p. 25). I want to stress this anonymous, diffuse social normativity/normality, because this description of legal normalization suggests, in my interpretation, that no such concrete order of behavior can be understood as merely legal. Rather, accurately described, law is only one indistinct dimension that structures, *among other types of normativity and normality*, practical engagements. Such engagements are not so much about obeying commands as they are about being involved in certain kinds of practices — traveling to meet one's family, shopping for

food in order to throw a party — that typically unfold in specific ways. Here law is at best only one type of normalization that forms our practical possibilities of orientation in the world.

Lindahl argues that legal possibilities are "first-person [my and our] repertoires of involvement with others and with things" (Lindahl, 2013a, p. 131). However, as anonymous forms of habit, they are not strictly speaking "mine." In Maurice Merleau-Ponty's phenomenology of perception, "anonymity" is an important dimension of perception: when I perceive something, perception as such is not my personal project aiming toward deliberate goals. Such projects can build upon the perceiving bodily engagement with the world, but they do not describe this most "primordial" layer. Rather, the subject of perception is my body (my eyes, my hands, my ears, my skin), and this subject has a specific passivity and impersonality to it (Merleau-Ponty, 2002, p. 250). When I perceive, say, a notice board from afar and cannot read what it says, the board "calls me" to approach it and find the optimal distance and the perspective from which to read what is written on it. I immediately "know," without reflecting, what I "ought" to do in order to see the text that now is too far for me to see. The perceptual object itself seems to solicit certain movements and positioning in space from me in order to be seen correctly. It is never given completely to my perception but always as a *Gestalt* with a horizon of further possible perception of its other sides. A certain normativity of how one "ought to" move around and in relation to that object regulates my perception: in order to see the backside of the notice board, I need to grab it into my hands and turn it around.

I can discover how to "best" perceive a *Gestalt* object because the object itself is a sediment of my past perceptions. I have acquired motor, embodied skills through learning from past lived experiences, my own but also others, and with these skills, I can without effort move about in the world. Perception and embodied intentionality are in general about "reiterative anticipation," to use Lindahl's apt expression. Furthermore, my motor and perceptual skills build up in a world that is given to me full of achievements of others' past intentional orientations. As Sara Heinämaa explains:

> My perception indicates or refers back, but does not include, a whole history and prehistory of sensory-motor agents, living bodies, who have acted on their environments and created what I now find in my perceptual field: the perspectual thing and my sensing moving body. [T]his picture [of the perceptual field also] proposes that our own perception is not an originative or creative activity, but a reactivation. At best, we produce modifications or new variations of earlier perceptions and add new layers of objectivity to the foundation of the perceived world as it is provided for us by our predecessors, human and animal. (Heinämaa, 2015, p. 133)

Legal boundaries of behavior are also such achievements that I can take up as a dimension of what it is to orient oneself in a certain situation. They offer me certain possibilities of orientation that I can use in my own orientation without these

possibilities being my achievements in the sense of originating in me. I do not "possess" these possibilities, they are not my property in the sense that legal philosophy has typically thought about "rights" as one's possessions. They are rather given to me as general — open to an indeterminate number of embodied subjects — possibilities of orientation that I can reiterate and use, and with their help, anticipate how the practical situation within which I find myself will unfold in the four dimensions. As Merleau-Ponty puts it:

> My act of perception [...] takes advantage of work already done[.] [M]y body and my senses are precisely that familiarity with the world born of habit, that implicit or sedimented body of knowledge [*savoir habituel*]. [...] What we in fact have is consciousness of an inexhaustible object, and we are sucked into it because, between it and us, there is this latent knowledge which our gaze uses — the possibility of its rational development being a mere matter of presumption on our part — and which remains forever anterior to our perception. If, as we have said, *every perception has something anonymous in it, this is because it makes use of something which it takes for granted*. The *one who* [*Celui qui*] perceives is not spread out before himself as a consciousness must be; he has a historical density, he takes up a perceptual tradition and is faced with a present. (Merleau-Ponty, 2002, p. 277, partly my emphasis, translation slightly altered.)

Notice here how far we have come from the conception of law as mere external imposition of commandment and requirement of obedience. Here law is understood much more as something that, precisely, *forms* experiential life from within. Insofar as law concretely articulates our orientations in the world and toward each other and ourselves, it withdraws from view as a thematically "legal" and "collective" practice, and becomes relatively indistinct from other types of normativities, such as a certain normativity regulating mere perception.

I want to stress this point to which Lindahl does not pay enough attention in order to highlight the difference between law as a concrete, effective but unobtrusive order and the explicit thematization of behavior in legal terms. Insofar as law forms a concrete order of embodied orientation, it is only non-thematically legal and collective, and becomes indistinct from normality and habituality, how a "normal person" orients oneself in a specific situation, and such normality and habituality is always constituted also by other types of normativity than the legal one. I find this state of indistinction interesting, because it suggests that *no instance of orienting oneself in the world is a mere actualization of a set of legal possibilities, but it is always also something more and other*. Such irreducibility of behavior to the actualization of pregiven possibilities is precisely what Agamben's notion of impotentiality also suggests. We return to habituality and Agamben's notion below. Let us now look at the explicit thematization of behavior as legal and collective. Heinämaa notes the following on the thematization of the embodied experience:

> The functions of my perceptual organs remain non-thematic in ordinary experience, but they can be disclosed by reflection, and on the other hand they "demand" or "require" our attention in abnormal circumstances, such as sickness and fatigue. When I climb up the hill, for example, and get tired, the focus of my attention starts to waver: instead of staying fixed on the top of the hill and on the path that leads up, it starts to oscillate between my goal (the perceived hill top) and my wearied limbs. The movements and sensations which at the outset were, as if, transparent or in the margins of my experience, now come to the fore. (Heinämaa, 2015, p. 131)

It is this general phenomenon of "estrangement" of experience, the non-satisfaction of anticipations and the becoming-ruptured of the familiarity and a certain "automatism" of the habitual experiential flow that presents the occasion for explicit thematic consciousness of that which conditions the familiar unfolding of experience. According to Lindahl's account, things are not so different with law. The indication that it is law that structures what we are doing, and the identification of our practice as legal and as "our joint action," are reflexive achievements and second-order operations.

6.5 Indication, identification and representation of the legal collective

The very normalization of law into a concrete, habitual order of behavior sets the background against which abnormal behavior appears. Remember the Kripkenstein paradox, which shows how something that interrupts the typical unfolding of a familiar practice – a student interpreting the addition function in a math class in a way that strikes everyone else as utterly bizarre – renders that practice itself thematic. It challenges the participants to define and explain how exactly the addition function is to be used correctly. An interruption of a familiar practice *indicates* that a certain kind of practice is taking place and solicits participants, or better, the teacher/authority to explicitly *identify* the contours of that practice, to explicitly re-draw its constitutive boundaries. Lindahl describes familiar situations, such as shopping, the interruption of which have a legal significance: if somebody leaves a supermarket without paying for the produce, and others spot him doing so, the practical situation is thrown into legal light. Shopping is suddenly disclosed as a legally regulated practice in which we, as participants, have certain obligations and rights (Lindahl, 2013a, pp. 26-30).

As the paradox that we have been discussing extensively suggests, it is the interruption of a familiar practice that offers, or even seems to force, the occasion to indicate, make explicit, that law is taking place, as well as re-identify what it is that "we" are doing together. The explicit *indication* and *identification* of a legal order and a legal collective whose behavior it regulates — securing the meaning of a conduct *as* legal/illegal — is a problem both for theory and for the legal collective itself. There is

no fixed legal order, but, rather, cases of interruption will be investigated by legal authorities who will re-identify what the legal boundaries, in fact, are, and whether they were breached and with what consequences.

If Lindahl can be said to rethink law as *parole* rather than *langue*, as a concrete order rather than a system of norms (without, of course, abandoning the notion of law as *langue*), then the fact that the question of *deixis* or indication is so important in his theory is unsurprising. A classical problem in legal theory has been how to draw a distinction between law and morality, and, arguably, this question has been approached with the notion of law as *langue* in mind. The attempts to answer this question take the form of finding objective criteria that would allow making a credible distinction between these different kinds of normative orders as if from the outside. Lindahl's question is different. With law as *parole* that *indicates its very own taking place*, what matters are not criteria for identifying different normative orders. What matters are, rather, the forms in which a legal order *individuates itself* by counting a certain set of legal possibilities as its own and by representing instances of actual behavior as legal or illegal (Lindahl, 2013a, pp. 15-18, 75-81).

Above we already mentioned collective identity as sameness, the relatively stable patterns of behavior that correspond to relatively stable normative expectations about who ought to do what, where and when: "[A] legal collective remains the same over time to the extent that its members develop and deploy the dispositions that allow them and third parties to say that they are living by its law, i.e. that individuals abide by who ought to do what, where, and when" (Lindahl, 2013a, p. 85). Collective selfhood, for its part, means that individuals can reflexively recognize themselves as doing something together with others: they can refer their own behavior and the expectation-meeting behavior of others to their collective-in-action. As we just saw, legal normativity, insofar as it becomes effective and regulates behavior in the four dimensions, tends to become relatively indistinct from other types of normativity and normality that articulate experience. For this reason, a crucial function of legal authorities is to indicate *that* law is relevant here, *that* law is in fact taking place and regulating behavior. Although also lay persons do at times indicate, when the need arises, that "we" form a legal collective and as members of this collective we ought to act accordingly, this monitoring of the permanence of collective action falls upon the authorities.

The function of the use of the indexicals "we" and "ours" is to indicate the very taking place of law and legal joint action:

> a more or less *anonymous* stratum of behavior [is] a form of collective action that is not yet action by a "we," such as in the utterance, "We the people do hereby ordain…." Linguistically speaking, the indefinite pronoun, "one," alludes to this anonymous domain of sociality, in contrast to the subjective or objective cases of the determinative pronoun: "I/we", "me/us." (Lindahl, 2020, p. 120)

Such normative speech acts that speak in the *first-person plural* ("we have decided…," "a member of our collective ought to act in this way and not in that way") and use other indexicals, in particular the "own," indicate "an indexical organization", an organization from "our" perspective of space, time, subjectivity and act-contents (Lindahl, 2007b, p. 8). Indexicals seek to show, make manifest, that what is happening is "our" ordering of reality, including practical possibilities that are of significance to "us" and to what it is that we are doing together, excluding other possibilities.

Remember that also for Luhmann, everything begins not only with a distinction, but an *indication* of which of the sides is the preferred one. *This* side, and not *that* side, this (in)side and not that (out)side, will be the starting point of all further operations. In Lindahl's account, the need for the explicit indication that "we" are a legal collective who ought to act together in specific ways and not in others arises in an occasion of interruption:

> if joint action in the mode of legal understanding is pre-reflexive in that the actors need not explicitly take up the first-person plural perspective when acting, this perspective now [in a case of interruption of the regular flow of praxis, like somebody stealing produce in a supermarket; my addition] becomes *reflexive*: who qualifies an act as illegal views him or herself and others, including the would-be thief, as part of a group, the members of which ought to act in certain ways — and not in others. The pre-reflexive, more or less anonymous, "one acts" gives way to the reflexivity of "we ought to act" in this way (and not in that way). The group becomes conspicuous as such. Accordingly both the illegal act and the collective become conspicuous in the form of their discordance. (Lindahl, 2013a, p. 138)

An interruption of the normal, habitual flow of the intersubjective practice throws into relief that practice and the fact that it is a certain kind of practice of a certain kind of collective. What does not fit in, an act that the participants cannot attribute to the collective, makes the collective, the normativity of its joint action and its point (what it is that "we" ought to do together) conspicuous as precisely what was interrupted and how things ought to have unfolded. We become aware that we were expecting a certain kind of behavior — a type of behavior that we can attribute to "us" who are doing something together — when those expectations are disappointed. A suspension of the normal attributability of behavior to a structure of iterative anticipation makes this structure itself thematic. I would add that suspension of attributability of behavior to an order of meaning is by no means specific to law and the sovereign in the explicitly political sense, but it seems to characterize all kinds of normatively structured experience. All experience that anticipates that certain things ought to happen rather than others will be left in a state of suspension of meaning-attribution when something happens that breaks with those expectations.

What an interruption makes thematic is that there is a *limited* "realm of practical possibilities as the range of acts available to us, the members of a collective, when acting together in the course of joint action: legal com-possibilities. Law opens

up practical possibilities by empowering certain actions and empowering indeterminately many — but not infinitely many — ways of connecting these actions to each other [...]" (Lindahl, 2013a, p. 156). An interruption makes *legal closure* thematic. Up against "our inside" of limited legal possibilities is a "strange outside" of other possibilities but our own. "We" have drawn our legal boundaries in specific ways and not in others. An interruption breaches these boundaries and brings disorder into order. Naming interruptions "illegal behavior" is the typical way for law to deal with boundary-breaching. A legal collective, when determining behavior from its perspective, can recognize it explicitly either as legal or as illegal. By so representing behavior as legal or as illegal, it simultaneously, and implicitly, draws a limit between itself and what remains unordered for it. We are already familiar with this logic from Luhmann's account, although Lindahl gives it a new spin, as we will see.

For now, let us look more closely at the notions of representation and action. The interruption gives the occasion to disclose *ex post facto* past unreflective practice as attributable to a jointly acting collective: what before was only (or at best) unthematically legal and anonymous is now seen as legal joint action. Note the reoccurrence of the by now familiar retroactive temporality: what happened in the past can now be seen as what it "truly" and "always" was. Habitually behaving individuals appear only now as participants in a joint action, as *representatives* of a legal collective. They are deemed, represented, as representatives of the collective insofar as their behavior can be attributed to the collective as action abiding by its boundaries. Also, the attribution of illegality to behavior is a way of representing that behavior as something of relevance to the collective, namely as being in breach of its boundaries.

Representational acts make two claims. The first claim is *that there is* a collective that this act represents, on behalf of which it speaks. The second claim purports to identify and recognize this collective *as this* rather than *as that* kind of a collective. The former is *an existential claim* which is necessary for that representational act to refer beyond itself, to something (a collective) in the world that precedes this act and on behalf and in the name of which that act is performed. The latter is a *claim of identification*: it spells out what this collective looks like, re-draws its contours by determining what its boundaries are and for the sake of what point these boundaries have been drawn. At the core of this account of representation is the phenomenological notion of intentionality: the appearance of something as something to someone. In intentional acts *an object* is intended (e.g. perceived, judged, cognized, recognized, represented) and it is intended *as something* (e.g. as a tree, as a crime, as being true, as being ours, as a legal collective enabling, say, same-sex marriage). As Lindahl explains:

> All representational acts have two dimensions which follow directly from the insight that to represent is to represent something as something. On the one hand, representation is the representation *of* (something); on the other, something is represented *as* (this or that). So also with the representation of collectives. (Lindahl, 2019c, p. 265)

But, this time, in question is not embodied, pre- and post-representational, only ambiguously legal intentionality, but explicit thematization of something as legal and pertaining to a legal collective. Representation is a necessary condition for the appearance of a legal collective (for any kind of a positively existing collective, really). Collectives and orders are not "real entities" simply existing in themselves, beyond all representative acts by individuals, but rather meanings or, better, *meaningful articulations of reality*. Reality can only appear as "shared" insofar as it is mediated by such articulations. This "non-realness" of collectives and orders implies that their emergence and conservation require acts that represent them, that constantly re-iterate, authoritatively, the existential and identificatory claims. Furthermore, and importantly, such meaningful articulations — or forms, we could say — are *not* mere fictive constructions *ex nihilo*, but precisely articulations *of reality*. Explicit legal representations are articulations, distinctions, that target the relatively indistinct lived reality in which legal normativity does not stand out from other types of normativity guiding our embodied orientation in the world. This means that representational acts that claim that there is a collective and identify a collective as this rather than that kind of a collective never give an exhaustive and alternativeless account of such reality. Other representations of it remain possible. Giving form to reality through representations of legal collectivity thus does not amount to pure productivity, but there always remains something a representation/form *cannot appropriate*. As Lindahl notes, "[w]ere what is given in legal intentionality merely a legal construct, it would not be possible to distinguish between something which is the object of legal intentionality and the object as intended" (Lindahl, 2013a, p. 120). The notion of intentionality requires "minimal realism."

Representing something as something rather than as something else — A as x rather than y — gives us an access to A, lets A appear in a meaningful way. However, it never quite catches A, because another representation (A as y, or z or w) was possible. A collective does not have natural boundaries, all boundaries are modifiable, and no particular determination of the collective is an ultimate one; but also, no collective emerges without some representation. Representation thus is productive, but also irreducibly reductive and therefore contestable:

> For the one, no collective can emerge absent an act that seizes the initiative to speak and act on behalf of a collective, representing us as this or as that. [...] For the other, representation ensures that a collective is contingent in a twofold sense: it is contingent *that* we* are a collective and *what* we* are as a collective. Indeed, there is no representation absent more or less forceful inclusion and exclusion: we* are represented as this *rather than* as that group. If intending something as this (rather than that) brings about a "significative difference," I would add that representing a collective as this (rather than that) operates a *representational difference*, both cognitive and normative. (Lindahl, 2019c, p. 265, referring to Waldenfels, 2002, pp. 28-30, original emphasis.)

The logic of representative acts is that of *inclusion and exclusion*: each representation of something A as something *x* rather than *y includes* the A in the form of *x*, thereby *excluding* alternative forms, *y* and *z*, that A also might have taken. No representation simply mirrors a ready-made reality (see Lindahl, 2000). Representative acts that claim to speak in the name of a collective, of a "we," characterize this "we" by determining collective possibilities, by drawing legal boundaries, specifying how its members ought to orientate themselves in space, time, toward each other and the things of the world. Legal collectives expect both behavior that abides by its boundaries and behavior that does not, that is, they expect both legal and illegal behavior and prepare themselves accordingly (like putting in place forms of sanction). Representations, then, have as their effect a cognitive difference: a collective is recognized and a state of indistinction distinguished, and the collective is recognized as something rather than something else. In addition, they give rise to a normative difference: a set of collective possibilities is posited as obligating and empowering in distinction to alternative sets. "*Recognition is also always misrecognition*", because it marginalizes, with no objective justification, alternative forms in which individuals, behavior and collectivity could be represented (Lindahl, 2018, p. 283, original emphasis).

All these differences remain contestable and, thereby, also modifiable, at least to an extent:

> But the surfeit of possible ways of acting together that have been marginalised can irrupt into a legal order, challenging its putative unity by transgressing the boundaries of what counts as consequential to the collective — as happened [when] the KRRS [the Karnataka State Farmers' Association] forayed into the private property of Monsanto to raze its fields of GMOs with a view to preserving the traditional way of life of Indian farming communities. (Lindahl, 2018, p. 295)

If this representation of the "we" as *x* excludes alternatives, and it lacks any final objective license to do so, as we have seen, such representation can become challenged and put into question by those who favor an alternative representation *y* or *z* of that collective. What also can be challenged, and often enough is, as the case of the KRRS in the quote above suggests, is one's being named as a member of a legal collective and as obligated to behave in specific ways by it. Evoking the Third Question, which challenges the way in which a legal collective attributes space, time, subjects and acts to itself in terms of il(legality), can also have as its goal the *exclusion* from that collective to the benefit of the existence and preservation of another one.

In Lindahl's illuminating example, the European Union has represented itself as a common *market*, thereby excluding alternative characterizations than the economic one of what might bring European peoples together. Challenges to the priority of market thinking as what unities Europe draw on meanings of European community that economic priority marginalizes in order to represent an alternative EU, one in which, say, social justice plays a central role.

So, an inclusion of a certain set of collective possibilities excludes other possibilities outside the collective's purview, but only such excluding inclusion gives rise to a limited collective perspective. The self-inclusion of a legal collective in a representative act is simultaneously a self-exclusion: an exclusion of possibilities of articulating our collectivity. The excluded possibilities can, then, become thematized in acts of politics of legal boundaries as wrongfully excluded ways of recognizing who we "really" are (Lindahl, 2013a, pp. 199-201).

Alternatively, the direction of critique can also be reverse: challenging that one has been rightly recognized by one's inclusion in a legal collective. In Lindahl's example, by occupying and destroying fields where GMO plants are cultivated, the peasant movement KRRS challenges its inclusion into the global legal order of the WTO, which regulates the use of genetically manipulated organisms. The KRRS thereby seeks to make manifest the strangeness of the traditional Indian peasant form of life to this order of global trade and campaigns for the preservation of this form of life outside the agriculture represented under the aegis of the WTO (Lindahl, 2018, p. 24). By "preferring not to" cultivate land in ways recognized as legal and appropriate by Monsanto and the WTO, the KRRS makes manifest that the way in which the WTO seeks to organize agriculture is a contingent indication and identification of a global legal collective that lacks objective justification and literally takes space from an incongruous way to cultivate the land.

To represent a collective is to (re)draw its boundaries in a non-alternativeless, contingent way that opens up the possibility a certain kind of a collective, while closing down others. Representation is deeply paradoxical:

> On the one hand, [...] representation effects a *self-exclusion*, a "self-othering" if I can put it that way, in the very move by which it includes a self. On the other hand, representation is never only the exclusion of the Other. What I mean is that representation cannot exclude the Other without also including it as one of us. If self-inclusion goes hand-in-hand with a self-exclusion, so also representation ensures that Other-exclusion goes hand-in-hand with Other-inclusion (and not simply as what has been excluded). Self and Other are *more and other* than what any of their representations can afford. (Lindahl, 2020, p. 118, original emphasis).

As the legal collective is paradoxical in this way and never simply coincides with itself nor is simply different from what is other to it, it can also change: it can come to recognize as its own possibilities that it before excluded from itself, and release to the domain of the unordered possibilities that it before included in itself.

To speak about "collective action" is, thus, by no means innocent. For Lindahl, collective action can only be a *representation* of behavior as collective action: behavior is *deemed or claimed* to be "collective action," and "collectivity," "legality" and "illegality" are *attributed* to a manifold of individuals and their conduct (Lindahl, 2019b, p. 438). To speak about "action" is to use a gathering formulation that identifies something (behavior) as something (an instance of legally regulated joint action). It is

a distinguishing intervention into law's "primordial" concreteness and state of relative indistinction that prefers a certain articulation of a situation over other possible ones. But note that this relative indistinction is not the same zone of indistinction between law and politics in the state of exception that Agamben talks about: it is not about the explosion of the rule, of a growing impossibility to say what the law is because judgments of political expediency empty stable legal norms of their contents. Behavior can be contingently, and always ambiguously as to its final justification, attributed to a collective as being within its boundaries or in breach of them.

This irreducibility of behavior to its legal interpretation, and the implied possibility of plural renderings of it, point, I think, to Lindahl's *post-humanistic stance to legal order*, if by "humanism" we understand the general conviction that society, politics and law have their origins in human rationality and the deliberate decision of individuals to act together and agree to a social contract of some sort.[61] The acting subject is not the sovereign source of the meaning of her action, and joint action is not an aggregate of individual actors each intending the same thing in their minds.[62] Each singular case of "behavior" only counts as legal, and therefore as collective, insofar as it can be seen, according to the relevant co-actors and ultimately authorities, as pointing beyond itself to a legal order the practical possibilities of which the behavior in question is seen more or less to actualize or to breach. To identify behavior as an

[61] That collective action ought to be understood as undertaken by deliberate and intentional individuals seems to be Alexander Somek's understanding of it. "At the end of the day," he writes in his critique of Lindahl's *Authority and the Globalisation of Inclusion and Exclusion*, "the [IACA-]model appears to betray an organized vision of collective agency that imputes to individuals participation in common action regardless of whether they intend it or not." Somek implies that one ought to talk about collective action only when individuals deliberately act together, which is of course implausible as a social ontological account of global legal orders. For Somek, then, Lindahl's arguments on "collective action" are "grossly overstretched" (Somek, 2019, p. 364). For Lindahl's response (according to which Somek gets wrong the notion of representation) see Lindahl, 2019b, pp. 437-446.

[62] This is the problem that also Luhmann has with the traditional notion of action, and the reason why he prefers the notion of communication: conceiving of action as originating in the individual who controls its meaning and course (how action begins, unfolds and ends). As such arcs of action cannot plausibly describe how social systems function, Luhmann rejects the notion of action as basic for sociology. For him, society does not consist of individuals and their actions. For Luhmann, the human being cannot be seen as the center of society. As King and Thornhill note, "the basis of function systems in modern society does not result from the prescriptions of a rational legal subject, but instead from each system's autonomous and contingent self-reproduction" (King & Thornhill, 2003, p. 174). Action is not a basic element of society, but, instead, systems' communicative operations are. Furthermore, Luhmann argues that action in itself cannot guarantee connectivity to further action: when an individual action has reached its end, it simply ends, without securing a continuity (Luhmann, 1982, p. 369). If understood in this way, the notion of action is not suitable to explain autopoiesis, the system's recursive reproduction of its own elements with the help of its own elements, as this requires explaining precisely the connectivity of operations to operations. Luhmann does not, however, completely abandon the notion of action. He rather redetermines its conditions of identification and embeds action in the self-reproduction of social systems. Action is not a basic unity of sociality, but something more is needed to identify something as a social action. Action can only be identified as such by an observing system and thus within it and as its element. "[T]he identification of utterance as 'action'," Luhmann explains, "is the construct of an observer, that is, the construct of a communication system observing itself" (Luhmann, 2012, p. 45). Luhmann "reintroduc[es] the concept of action as a construct of an observing system, where the system can localize actions as points of imputation in the system and in the environment" (Luhmann, 2012, p. 371, footnote 118). Imputation, the attribution of communicative operation as somebody's action, is needed, because "communication cannot be observed directly, only inferred. To be observed or to observe itself, a communication system must be flagged as an action system" (Luhmann, 1995a, p. 164).

instance of collective action is to understand or interpret it *ex post facto*, and, thus, always only putatively, as referring to an order that only can secure its meaning as such.

6.6 The paradox of representation

To preserve a collective self in existence, then, requires constant "work" or "labor" (van Roermund, 2020; Lindahl, 2020, p. 125-128) on the part of participants and, specifically, legal authorities. They are called to re-indicate and re-identify their legal collective in always novel situations in which the existence and identity of the collective becomes a thematic issue and questioned. I suggest drawing a distinction between the non-thematic *use* of legal possibilities of orientation in familiar practices and the thematic *work* done by legal participants and, in particular, legal authorities as they seek to re-draw the contours of the collective they claim to represent. Legal normativity structures familiar practices but it does not stand out as such: anonymous use of ways of orienting oneself in a familiar world intertwine with whatever it is that one is doing. One shops for food in order to throw a party and not explicitly in order to realize a point of legal joint action. If the need arises, specifically in cases of interruption when legal authorities are called to interpret the situation from the perspective of the legal collective, one's behavior can be "worked over" by representing it in explicitly legal terms.

Lindahl describes, as we already saw, the unthematic and unreflexive, anonymous form of sociality in Heideggerian terms as being in the world that is "ready to hand." For Heidegger, Dasein's non-thematic being-in-the-world takes different modalities of "concernful" dealing: "having to do with something, producing something, attending to something and looking after it, making use of something, giving something up and letting it go, undertaking, accomplishing, evincing, interrogating, considering, discussing, determining…" (Heidegger, 1962, p. 83). In these modalities of using and handling, entities "are not objects for knowing the world theoretically, they are rather what gets used [*das Gebrauchte*], what gets produced, and so forth" (Heidegger, 1962, p. 41). Our familiar ways of dealing with the world can be understood as representative in the broad sense that they are intentional: they do use, treat and grasp something as something, although they do not explicitly objectify what is used and predicate something on it. Van Roermund (also drawing from Merleau-Ponty) is correct to point out that the difference between habitually orienting oneself and explicit legal representation of things resembles that of "grasping" and "pointing": whereas the first is about "developing a grip" — developing a use of something or a use of one's own body, acquiring a habit — on how a certain practice appropriately unfolds, the latter, pointing, is precisely an indication in the sense that we have been discussing: pointing out to something in order to distinguish it from something else, objectifying it (van Roermund, 2020, p. 113-114; see also Lindahl, 2020, p. 119). The self that has acquired habitual ways of "getting a grip" on the world

and orienting in it is not aptly described in terms of a subject relating to an object. Rather, it is itself an accomplishment of a certain continuous embodied engagement with the world that "anonymity" describes better than merely a proper name. When I have learned, say, to get a grip on the flute and acquired the skill to play it, the skill is "mine" and a characteristic of my personality, but as we discussed above, the skill does not originate in me: I have rather taken up a certain established use of the body and the instrument — how one plays the flute — and continued this "tradition of embodiment" in my own way.

Agamben makes the important point that a habit and habitual use must not be understood as a mere actualization of a possibility, but rather as a potentiality to do something which, as we saw in our previous discussion of this notion, is also always a potentiality *not to* do something:

> A poet is not someone who has the potential or faculty to create that, one fine day, by an act of will (the will is, in Western culture, the apparatus that allows one to attribute the ownership of actions and techniques to a subject), he decides—who knows how and why — like the God of the theologians, to put to work [i.e. actualize; HL]. And just like the poet, so also are the carpenter, the cobbler, the flute player, and those who, with a term of theological origin, we call professionals — and, in the end, every human being — not transcendent title holders of a capacity to act or make: rather, *they are living beings that, in the use and only in the use of their body parts as of the world that surrounds them, have self-experience and constitute-themselves as using (themselves and the world)*. (Agamben, 2016, p. 62, my emphasis.)

Acquiring habits is not about realizing a given human essence but rather becoming capable of doing something that one can put to work and actualize but need not, and in every actualization of a habitual comportment the potentiality not to actualize it remains. Furthermore, no human self is merely, say, a flute player but has a range of habitual abilities that intertwine in everyday life such that one's shopping for food requires a range of skills (that have mostly nothing to do with law).

Why is this important for our account of law? Because when explicitly recognized and represented from the perspective of the legal collective, the impotentiality inherent in the use of legal possibilities as well as the becoming indistinct of legal normativity from other types of normativity easily vanishes from view: behavior is now recognized insofar as it is legally relevant and actualizes, or not, legal possibilities, it becomes attributed to the legal collective or it is seen as non-attributable to it and hence illegal. The depth and multidimensionality of the lived experience cannot possibly be recognized as such in explicit legal representation of behavior (and, hence, Agamben's attempt at thinking of politics that affirms potentiality in terms of the deactivation of the law). Embodied orientation in the world is never simply a means to a specific end, but this is how legal representation will recognize it: as an instance of joint action geared to "put to work," realize, its point, or failing to realize its point.

Lindahl's account of legal authority will, however, seek also to open an *indirect* way for law to deal with this blindness of the legal representation to the multiple dimensions of pre-representational experience. Against what Schmitt and Agamben claim, suspending legal measures is not, in Lindahl's account, only about unhinging sovereign violence. It can also be a way of indirectly recognizing that "we" only have *limited means* of recognizing behavior. While Agamben interprets the impotentiality of law as a violent state of exception or as a messianic post-juridical condition, Lindahl suggests that it has wider use within the law: suspending the actual application of our legal norms to a situation, suspending the representation of a situation in legal terms, may also count as an *ethical gesture* that seeks to preserve, rather than destroy, what remains strange and inappropriable in "our" terms. Not holding back to dominate and destroy, but "holding back to hold out" (Lindahl, 2013a, p. 255), to preserve forms of (collective) orienting in the world that "we" cannot include within our legal order. "On this reading, exceptional measures are the common root of boundary-setting undertaken either to neutralize and destroy, *or to preserve and sustain*, what radically questions the legal collective" (Lindahl, 2013a, p. 251, my emphasis). "[C]ollective inaction" (Lindahl, 2020), or put it in an Agambenian language, the impotentiality of law, is not to be understood merely as the liberation of sovereign violence and what enables the sovereign ban and the biopolitical capture of life. The suspension of the application of the rule to the fact is also how another collective may have space to preserve itself, its form of life, and not be separated from its form.

We will need to investigate Lindahl's account of authority and collective self-preservation as restrained collective self-assertion more closely in a moment. For now, and to finish this section, let us articulate as the *paradox of representation* the relation between the pre-representational, or unthematic, mode of law and legal representation. For Lindahl, "the IACA-model of law acknowledges and accommodates *a certain priority* of the pre-representational modes of sociality in which boundaries are (re)drawn once and again" (Lindahl, 2020, p. 123). Here, the boundaries are (re)drawn in the sense of being (re)used, reiterated, not in the sense of being explicitly (re)indicated and (re)identified. The priority of pre-representational modes of sociality is not absolute because the use of legal possibilities depends, takes up, pre-given possibilities that are traces or achievements of past acts of explicitly indicating and identifying a legal collective and its order of boundaries. Pre-representational social practices enjoy only *a certain* priority: "if representational practices rely on embodied intentionality, so also, and conversely, representational practices *embody* intentionality, where I use the term 'embody' in a verbal sense that resonates, in some ways, with Foucault's studies on the disciplining of bodies" (Lindahl, 2020, p. 124). Recall here our earlier discussion on Lindahl's change of point of view in legal theory from law as a system of norms to law as a concrete order seen as a unity of bounded behavior from the perspective of those whose orientations it regulates. Recall also how this resonates with the notion of positivity as a disposition: being disposed to behave in certain legally empowered ways rather than others shows that "positive law" is not simply about acts of explicit norm-positing but also about being concretely disposed to orient oneself in certain ways. Furthermore, this account

of the positivity of positive law suggests both that a habitual disposition requires an external imposition of legal rules the success of which is dependent on these rules becoming internalized by their addressees.

Let us articulate this two-way dependency — the disposition on the imposition, and the imposition on the disposition — in terms of the *paradox of representation and constituent power*. So, on the one hand, there are no legal orders or collectives absent explicit representational acts that indicate and identify a collective. Legal collectives are contingent formations and require representation: constituent power in the general sense of a power to bring a legal order into existence. On the other hand, *all* constituent acts, also the "historically first" ones, must claim to represent a collective that already exists: "a purely productive closure is, literally," Lindahl explains, "incredible and unintelligible" (Lindahl, 2018, p. 291). As we have already noted several times, law can understand acts only as legal acts. There is then both a non-legal, or in Lindahl's terms an *a-legal initiative* that opens the possibility of a legal closure, of a legal collective and its order; and the interpretation of *all acts as already legal acts*. See here yet another formulation of the inclosure paradox: the act that gives rise to the collective closure both belongs and does not belong to that closure. What gives rise to the possibility to interpret acts as legal or illegal cannot itself be consistently shown to be either.

A constituent act makes an initiative to bring about a novel ordering of reality that a plurality of individuals then may (or may not) internalize and even explicitly recognize "as their own." In order to succeed, it needs to present itself as being empowered by the collective it seeks to bring into existence. The initiating act, in order not to appear as a mere expression of individual will, *attributes itself to* the collective, as being spoken and done on its behalf and in its name. A collective is a necessary presupposition — a fiction in Kelsen's terms — of a constituent act. What is only possible through the mediation of representational acts is presupposed by them as their empowering ground (Lindahl, 2008, p. 336; Lindahl, 2013a, pp. 150-151; Lindahl, 2018, p. 407). "Constituent power," Lindahl argues, "has the temporal structure of an anticipative retrojection: what is said to already have taken place is what is yet to come" (Lindahl, 2015, p. 168).

Constituent power does not produce a collective out of nothing and fully outside law and constituted power, unlike how modern political philosophy has traditionally understood this notion. "Constituent power can only found *by re-founding*, claiming to uphold the mode of existence of a collective by articulating an original unity that is challenged. Paradoxically, constituent power initiates by upholding" (Lindahl, 2018, p. 407, my emphasis). Constituent acts re-found because they claim to be responsive: they present themselves as responding to what they represent as interruptions of joint action and requiring the re-formulation of how "our norms" ought to regulate the situation. Constituent power is about re-articulating the collective self vis-à-vis a reality that it takes as resisting, even threatening, its existence:

> In responding to what challenges them, collectives exist in the mode of exertion, of struggle. […] [H]ow must reality be structured such that the self's relation to

> reality is laborious? The answer is that the self's laboriousness is correlated to the *resistance* of reality. Resistance is the ontological determination of the real, of what characterizes *reality qua reality* in the understanding of collective agency accruing to self-preservation. More pointedly: to characterize joint action as joint labor is to characterize reality *as* resistance to the collective self. The questionability of the collective self means that the real is what, challenging a collective, calls forth the self's effort to remain in existence. (Lindahl, 2020, p. 125, original emphasis.)

Why does the reality resist the collective self? Because even legally normalized behavior never simply realizes legal possibilities but is always also more than that, and on this non-coincidence builds the possibility to resist inclusion in, or exclusion from, a legal collective. The resistant reality can also be understood as another legal collective from which constituent acts seek to emancipate. The constant re-indication and re-identification of a legal collective and its order is necessary in order to preserve that collective self and collective perspective of reality in existence, against the background of a resistant reality.

Constituent power and constituted power thus cannot be opposed to each other in the sense that the first is fully outside the law and the latter fully inside. They rather cross each other in the form of the inclosure paradox: constituent power is the a-legal force that re-opens the framework of constituted power within which the attribution of (il)legality to behavior is possible. This opening is not one-off but takes place each time the perspective of a legal collective is indicated and identified in a situation that is taken to resist the preservation in existence of the collective self.

Furthermore, as we already saw with Kelsen, a constituent act can only *retroactively* be seen as really/rightly representing a collective. It can appear as an empowered, constituted act, if its addressees take the articulation of the collective possibilities that the initiative proposes as the premise of their behavior and begin to act in ways that these possibilities enable. Paradoxically, if a constituent act succeeds in its endeavor — to bring forth a novel legal collective — it will be seen as an instance of constituted power: "an act succeeds as the exercise of constituent power only if, retrospectively [retroactively], it appears to be the act of a constituted power" (Lindahl, 2015, p. 168). There is an intertwinement of constituent and constituted powers that deconstructs any facile opposition between inaugurating or unconditional and conserving or conditional power.

On the one hand, then, an act of constituent power is an *initiative* to bring forth something new. This resonates with the modern predicament of the loss of absolute, theological and natural foundations of social order and the subsequent need to bring one about. Somebody needs to take the initiative and "draw a distinction," to indicate in a preliminary manner a certain limited set of collective practical possibilities that the putative members of the collective may/ought to share and assume as their own. An initiative is creative, it anticipates what may come. On the other hand, the initiative must present itself as an *iteration* of a collective perspective already in place, namely attribute itself to and present itself as being empowered by an already extant collective

on behalf of which it speaks. This temporal paradox in which it is impossible to separate past and future into neat, self-sufficient moments in a temporal sequence has the structure of a reiterative anticipation (Lindahl, 2013a, p. 144).

Constituent power thus is not fully active but can be said to be *passive* or conditioned in a double sense. There is the passivity/conditionality inscribed in the would-be constituent act that needs to present itself as "obeying" a collective already there. It is also passive and conditioned in the sense that its constitutive force is dependent on its addressees picking up the initiative and stabilizing it into an extant order by beginning to use the possibilities it offers for them. For its part, constituted power, power conditioned and empowered by legal possibilities and iterating them, is not fully passive or conditioned. Already the one who actively "takes the lead" so that a collective may have the chance to emerge in the first place must claim to be a constituted power (see Lindahl, 2013a, p. 150). At the heart of conditioned power is, then, unconditioned power, and vice versa:

> The inaugural act which gives rise to the distinction between legality and illegality [...] is neither legal* nor illegal*. In other words, and despite the possible "success" of an inaugural act, in the sense of its efficacity, the conditions governing the emergence of (il)legality* cannot guarantee the objectivity of the distinction itself, as drawn in the apposite order, nor the objectivity of the order's boundaries. (Lindahl, 2013a, p. 152)[63]

Because of the inclosure paradox, a legal order is never free from a-legality, from being a use of power to form reality that lacks final justification. The emergence of the distinction between legality* and illegality* is itself neither, but rather speaks of the a-legal ground of legality. That the inaugural act is neither legal* nor illegal* thus means that it operates beyond any legal articulation of space, time, subjectivity or act-content, even if it must claim representativeness, which can only retroactively be (dis)confirmed as a (non)valid claim by the normalization of the initiative into a concrete functioning order and the recognition of this order as "ours."

But no retroactive recognition and identification of behavior or speech as legal can efface the fact that an inaugural act lacks authorization. After all, such later acts of recognition and identification *are also themselves representations*: they represent an instance of behavior or speech as something, including this behavior within a legal order and excluding alternative possibilities of signifying it. The lack of grounds of the initiatory-constituent act is retroactively "forgotten" by representing this act as an act of constituted power and therefore valid — but this act itself once more needs to claim to speak on behalf of a collective, and the problem is only displaced, not solved for good. Each act of explicitly (re-)indicating and (re-)identifying a legal collective claims to speak on its behalf, refers itself to it, but the confirmation of this claim is deferred to later acts of confirmation that recognize the former act as validly representative. But

[63] The asterisk signifies that the attribution of legality or illegality to behavior considers whether behavior is or is not within the four dimensions or boundaries of law: the subjective, material, temporal and spatial (Lindahl, 2013a, p. 124).

such an act of recognition itself calls for further recognition, etc. This referral and deferral of legality and collectivity, this paradox at the heart of law with which we are already familiar, destabilizes a legal order and makes of the preservation of a legal collective self a constant effort. A-legality never leaves a legal collective, because no instance of behavior or speech simply "is" legal or collective. Behavior only becomes such if it is represented as such, if it is attributed to a collective: through the logic of inclusion and exclusion that remains contested. What this means is that a legal collective is never present to itself. It is never simply identified as "legal" but rather suspended between representative claims that wait for recognition — that are themselves representative claims that wait for recognition. See here the similarity to what we above called the immunologic: pushing away what destabilizes a legal collective (a-legality) with means that themselves preserve that what is being pushed away with their help. A legal collective seeks to emerge and stabilize itself against a resistant reality through means that bring this resistance with them in altered forms. A collective cannot shake off its contingency.

For this reason, because a legal collective cannot possibly shake off its contingency, the possibility for a non-nihilistic law depends on the ways it deals with this contingency. As Schmitt and Agamben show, dealing with the resistant reality in order to preserve oneself may mean domination and violence. Lindahl's aim is to show that this is not the only possibility:

> the "hermeneutic power" of the subject to make sense of the Other, and [what] Van Roermund calls effort or labor, is undercut by a hermeneutic powerlessness in the face of what cannot be said and done in a given legal order, and where striving – laboring – to render the Other fully intelligible becomes an exercise in domination. Self-restraint in the face of a collective's hermeneutic powerlessness seems to be exactly the opposite of effort or laboring: a stance of effort-less-ness. Self-restraint as the acknowledgment of a finite responsiveness to what challenges a collective speaks to a holding back to hold out what resists our collective effort of appropriation through a laborious process of self-recognition. Both effort and letting-go resonate in the ontology of restrained collective self-assertion: collective action and collective *in*action. (Lindahl, 2020, p. 126-127, original emphasis.)

The constituent power to re-identify a legal collective is inhabited by a "constituent powerlessness" (Lindahl, 2015, p. 172), the inability to open a collective perspective in any other but limited, inclusive-exclusive terms. The reality resists a legal collective because it cannot possibly "fit" into its limited perspective (although, on the other hand, only through limited perspectives may we have access to a meaningful reality in the first place). That a legal collective only has a limited, although transformable to some extent, range of practical possibilities at its disposal, suggests, in Lindahl's interpretation, that *collective self-restraint*, the suspension of actualization of its limited perspective to a situation, is a way to *indirectly recognize* that there are other collectives, other normative "forms of life" that refuse to be

included into "us" and also struggle to preserve themselves. Legal unification — our self-inclusion — always comes with political pluralization, alternative articulations of collectivity that may refuse to be recognized in "our" terms. To think about a notion of a legal collective that is able to deal with its own impotentiality, with its own potentiality not to apply itself to a situation in ways that seek to avoid destroying the "strange," is to think about law that does not collapse into nihilism, to empty maintenance of itself for no other purpose but that of dominating life that it succeeds in capturing within itself. As Lindahl puts it, "everything turns on the question what political sense we are to make of the 'autos' of autonomy, i.e. of the 'self' of collective self-legislation" (Lindahl, 2008, p. 239), how to understand the collective self that seeks to preserve itself in a way that does not grant absolute powers of self-affirmation to this self. What is to be challenged is the understanding of "the [...] core of modernity [as nihilistic]: a subject — the people — that poses itself as the uncaused cause of a created being — the legal order — in view of securing the latter as the domain for the subject's unlimited self-security" (Lindahl, 2008, p. 330).

6.7 Impotentiality

I would like to think that our banal, everyday behavior already makes manifest *the idea of freedom as pluralization*. That no worldly engagement is merely about realization of a logic of a particular social system, legal collective or order, suggests the potentiality of behavior not to be counted-in by any of them. Trivially, when we travel or shop for food, our behavior cannot be contained within the legal order of the airport or the supermarket but is always, at least minimally, more and other to it: not simply about the passenger showing her passport and the border guard controlling it but also about them greeting one another; not simply about the client paying in order to participate in economic transactions but also about me welcoming friends to my home for dinner. What Lindahl calls a-legal behavior in the political sense, behavior that interrupts how the normalized legal practice unfolds by challenging how it makes the difference between legal and illegal behavior, and even its right to make this distinction in the case at hand, is not a qualitatively different kind of behavior. Rather, it uses this ability of human behavior *not to be confined* into particular legal or economic orders, *not to simply be the means to specific, legal or otherwise, ends* and about actualizing established legal or economic possibilities. For Lindahl, the individuation of a legal collective — *that* "we" are a legal collective — arises in response to the interruption the anonymous and undifferentiated normativity of sociality. The authoritative determination of legal (or moral) norms applicable to the interrupted situation at hand — the identification of *what* "we" are as a collective — is always a certain hypostatization, abstraction and separation of the situation from itself.

I would thus like to connect Lindahl's articulation of the idea of resistance of reality to a legal collective's self-preservation to Agamben's insights on human impotentiality. What is "primordial" for law, then, is the use of legal possibilities by

beings that are also able not to use them and do something else instead. Being capable of impotentiality means that an embodied human being is never merely actualizing some pregiven possibilities, simply realizing an essence, a genetic code or fulfilling the expectations of a social system — not even then when a human being's behavior can be seen as attributable to a collective. Whatever a human being does, as a potential being one maintains a relation to one's potentiality not to do what one is now doing and, hence, the possibility also to do something else.

What this impotentiality of human beings means in our context is that human behavior is never reducible to its *ex post facto* descriptions and identifications as this or that kind of behavior, as "joint action," as legal or illegal, as breaching legal boundaries or abiding by them: it cannot be mirrored point by point in representation because it is never simply about actualizing a pregiven set of possibilities. Being capable of one's impotentiality means that one's behavior never simply realizes a specific potentiality to do something: it is an ability not to do what one is doing, and thereby indicates the non-necessity of what it is one is doing. Human behavior is always more and other to any representation seeking to identify what it "really" is about. Using legal possibilities is nobody's vocation; actualizing specific legal possibilities is not a measure of one's humanity.

Already regular shopping in a supermarket is about something else and something more than simply realizing the principle "to each according to their means" (namely, shopping for food in order to invite friends and family for a party). One of Lindahl's examples of a-legal activity, a social movement that calls itself the *Mouvement des chômeurs et précaires en lutte* (the "Movement of the unemployed and vulnerable engaged in struggle") that engaged in *autoréduction*, that is, taking food from a supermarket without paying and redistributing it to the unemployed and the vulnerable, makes this irreducibility explicit. The *chômeurs* make such use of the produce and the legal space of the supermarket that strikes the legal collective as "strange," as action that they cannot attribute to their collective but that also refuses to be merely branded as petty theft. *Autoréduction* challenges the whole coupling of food and its distribution to the legally enforced point of the economic system: to each according to their means:

> If a-legal behavior questions the reference to collectivity, so also it questions the reference to the normative point of joint action. Such is the stake in *chômeurs*' action. On the one hand, the *autoréduction* misses the point of transactions in food shops such as Galeries Lafayette; it does not refer to or realize their normative point as articulated by the extant legal order. Amongst other things, the act is not oriented to realizing the principle "to each according to their means". On the other hand, it points beyond itself to another normative point, which, the *chômeurs* claim, ought to be realized by joint action, e.g. the principle "to each according to their needs". (Lindahl, 2013a, p. 141)

The occupation and destruction of Monsanto's fields by the farmers' association, just like the *autoréduction*, are, for Lindahl, "counter-examples or

counter-signs that intimate another world by interrupting the extant legal order" (Lindahl, 2019a p. 423). They make manifest and interrupt the legal boundaries that articulate space, time, subjectivity and acts into a specific, exclusionary form, thereby seeking to indicate and identify — exemplify — another formation of space, time, subjectivity and acts: one that the global capitalistic order of things excludes from itself. They make manifest that behavior is never simply about executing pregiven goals, legal or otherwise, and that its legal representation and attribution to a legal collective in the form of (il)legal behavior is a contingent, and potentially misrecognizing and dominating, inclusive-exclusive response to a situation. They question the point that seeks to justify why behavior ought to remain within certain bounds. Thereby, they expose the contingency of the legal collective: its paradoxical existence and lack of ultimate grounds. A-legal behavior poses the Third Question: with what right does a legal collective draw the distinction between right and wrong, legal and illegal behavior? With what right does it organize reality in the way it does? Posing these questions seeks to detach land and food, the activities of agriculture and eating, from their "destinies" within the global economic legal order, to arrest their inclusion into that order and to liberate them, to speak with Agamben, to "another use."

For Agamben, as we saw, the impotentiality of human beings implies that all representations are necessarily structured as dominating inclusive exclusions: a form of life is divided, included as something and excluded as what does not fit within this specific representational space. Every representation has something it cannot represent, something that it must leave unrepresented and repress. Agamben sees here the root of all evil: the separation of life from its form and abandonment to sovereign violence. But if human beings are potential beings and always, in whatever they do, in relation to their impotentiality, this raises the question of the possibility of a legal collective that would also remain in relation to its impotentiality. Agamben's politics of impotentiality as detaching it from its colonization by the governmental biopolitics and re-affirming it in the mode that he calls "studying the law," resonates with the positive normative value that Lindahl also gives to the exception as the law's suspension in order to preserve the "strange," the irreducibility of life to "our" law and representations. For Lindahl, non-nihilistic legal collective would be one that cultivates not only its positive contents and empowerments, but also one that would be capable of limiting itself, thereby indirectly recognizing the freedom of human beings and other legal collectives not to bind themselves to "our" rules. "We" may indirectly recognize "their" potentiality not to follow our rules by making use of our impotentiality, that is, our potentiality to suspend the enactment of our rules to them. Lindahl's idea of restrained collective self-assertion resonates with Agamben's own idea of impotentiality as the root of both good and evil, as well as the latter's reformulation of Spinoza's *conatus*: there "is a resistance internal to desire [to persevere in one's own being], an inoperativity internal to the operation. But it alone confers on *conatus* its justice and its truth" (Agamben, 2019, p. 28).

The significance of the phenomenology of embodied experience for legal and political theory thus lies precisely in having shown how different logics of inclusion

and exclusion of specified legal, economic, educational and other orders and collectives intertwine in lived experience, and how this experience cannot be reduced to any of those logics, remaining always more and other to them. Therefore, this phenomenology also provides us a constant reminder of why these orders that regulate our lives are contingent and why none of them is capable of representing the absolute value of what it means to be human.

6.8 Authority, (mis)recognition and restrained collective self-affirmation

Let me now wrap up this chapter by discussing Lindahl's take on legal authority and restrained collective self-affirmation. In *Authority and the Globalisation of Inclusion and Exclusion* (2018), Lindahl develops a normative account of the authoritativeness of legal authority in order to tackle a phenomenon he calls the globalization of inclusion and exclusion. Part of this phenomenon is the proliferation of legal orders that are either massively inclusive in that they claim globe-wide validity for themselves or massively exclusive in that millions of individuals and groups struggle to access them. Masses of people world-wide become both bound by legal obligations issuing from legal orders like, say, the WTO, and they become un-bound by legal orders, like those low-income workers or the unemployed in many European countries who have been excluded from welfare or health programs. People are increasingly exposed to both inclusive and exclusive acts by global legal authorities. At the same time, the existing institutional fora for legitimating legal authority are still predominantly the traditional national ones that have less and less purchase on legal orders of global scale. What emerging global legal orders lack are the institutional stages of legitimating legal authority they nevertheless claim for themselves (Lindahl, 2018, pp. 40-41).

This pressing problem is one central reason for re-thinking the authoritativeness of legal authority. As we have already seen, Lindahl's answer to this problem rejects a position that readily comes to mind: legal universalism. For Lindahl, the normative significance of legal authority cannot hinge on the progress of gradually eliminating all forms of exclusion, as all legal orders are bounded and both include and exclude, necessarily. Their functioning rests on a constitutive closure, or rather, a process of opening up and closing down. Therefore, legal theory must look at the logic of boundaries (Lindahl, 2018, p. 283). Lindahl devotes a lot of time to show that the logic of bounded orders also has *normative implications* for legal authority. To acknowledge the irreducibility of closure does not commit one to nihilistic relativism, he argues.

So, on the one hand, Lindahl opposes the utopia of universal justice within one single, comprehensive legal-political world order, and, on the other, he aims to counter the apology of relativistic nihilism. Even if emerging global legal orders lack institutional platforms for their democratic legitimation, this does not mean that inclusion into and exclusion from these legal orders would go unchallenged. To the

contrary, such challenges are ubiquitous, as Lindahl shows in his discussions of anti-globalization movements such as the Indian Farmers' Movement KRRS. It is on such local sites of challenging the dominating global orders that we should focus in order to investigate their ambiguous authority and responsivity to challenges. For Lindahl, the question of the normativity of legal authority is not confined to a specific institutional domain, such as the parliament. Rather, following the idea of the double inscription of the political, politics of legal boundaries is about situational and local challenges to the extant authoritative legal orders and how they have drawn the limit between what gets included into law and what gets excluded therefrom. Such challenges can take place and be staged anywhere, like in the fields in Southern India where the KRRS staged its protest against the destruction of the traditional peasant way of life by Monsanto and the WTO.

Such situational and local challenges to legal orders offer the occasion to study the dynamic between representation and recognition that Lindahl conceives to be at the core of the constitution of legal collectives as well as responsive ethics. Legal authorities always claim to speak and rule on behalf and to the benefit of a manifold of individuals and groups, but those individuals and groups have not and could have not given their explicit consent to be so represented. Those individuals and groups that the authorities address as members of the collective they represent may well not recognize themselves in that address. Authoritative representations of the legal collective always overreach, to a lesser or greater extent. They are always only representative *claims* that never meet with absolute consensus and recognition on the part of those they address. Some of those individuals or groups that the representative act includes into the legal collective, or excludes therefrom, will not recognize *their* idea of what their collective looks like in that representation. They will claim that authorities misrepresent and thereby *misrecognize* the identity of their collective. Hence, they will press claims for recognition: they will claim that *their* vision of the collective ought to be acknowledged (Lindahl, 2018, pp. 232-233).

Those who dissent and do not agree with the authoritative representations of the collective may appear as causing disorder and even as a security threat to the collective's continued existence. The *functional* task of legal authorities, Lindahl argues, is to monitor and enforce the extant boundaries of legal orders in response to challenges they face (Lindahl, 2018, p. 59). (It seems to me that Badiou and Agamben all understand legal authority only in such functional terms.) Lindahl also argues, however, that in the functional task of keeping order, legal authorities are always to a greater or lesser extent engaged in the work of *redrawing* those boundaries of inclusion and exclusion. In responding to challenges, legal authorities do not simply enforce the legal order they represent. Rather, in order to enforce it, they need to re-identify — re-cognize — what the "default setting" of the legal boundaries, in fact, is in the case at hand. Legal authorities are "experts" who produce knowledge of the collective, what it is "in truth" and what "really" joins all members together (Lindahl, 2018, pp. 314-315).

But what the collective "really" is, is articulated *in the response* to a challenge. Retroactive temporality applies here: what the joint action is "really" about and exactly

what kind of order has been ruptured and calls for enforcement "is the outcome of a *décalage* whereby what is yet to come is retrojected into the past as what, having already come to pass, only needs continuation [and enforcement]" (Lindahl, 2018, p. 324). The paradox of representation exposes that the articulation of the order to be enforced is dependent on and follows from what is interpreted as its rupture, although in its articulation, it is presented as an order already in place prior to the rupture. There is what Lindahl calls "the double asymmetry of question and response" (Lindahl, 2018, p. 278). On the one hand, a surprising rupture, a challenging question addressed to the collective concerning the way it draws its boundaries and recognizes itself and its other, is possible, because the collective perspective is limited and the collective only anticipates certain things to happen rather than others, and reality never quite satisfies these expectations ("asymmetry 1"). On the other hand, however, what the surprise and rupture is about, how exactly the expectations of the collective self were disappointed and what those expectations, in fact, were, becomes articulated in the authoritative *response* only ("asymmetry 2") (Lindahl, 2018, pp. 276, 281).

Unlike the constructivism that, according to Badiou, simply identifies knowledge and existence and can only re-cognize that for which it has an *already existing* name – thus leaving it to the supplement of politics to articulate the truth to which knowledge is blind – Lindahl's constructivism is paradoxical. There is no representation, identification nor recognition of the collective a as x without a challenge that forces the production of an authoritative self-recognition as a response to this challenge. The challenge ruptures the smooth unfolding of the joint action, "deactivates" it, renders it inoperative and creates disorientation. But the meaning of this challenge, what the question, in fact, asks, only becomes heard in the response. By responding, the collective recognizes both itself and its other as something. The relation of question and response is, thus, not linear. "Boundary-setting is retroactive in that the question to which it responds only becomes manifest in the response itself" (Lindahl, 2018, p. 298). What the question asks, and what the rupture is about, appears retroactively, through the response given to it by the authorities. This is one way of expressing the *completeness* of a legal totality: it will give a legal answer to every question posed to it, and hence it will also hear the question in such a way that it can answer it.

Furthermore, there is no necessary reason why a collective ought to respond to a challenge in a specific way. There is no fixed collective identity that would determine a response. This implies the *contingency* of every response and recognition of the self and the other as something. Alternative responses are always possible. This means 1. that those who pose the question may not recognize the response as a satisfying, proper response to their question, but rather as its *mis*recognition, and 2. that all "expert knowledge" concerning what the collective represented in the response "truly is," is simultaneously its *misrecognition, a collective self-misrecognition*. Because of this contingency, the recognition of the self/other is always also a misrecognition of the self/other. Recognition is paired with misrecognition of what it recognizes.

Remember that, for Lindahl, representing something, like the collective a, as something x is a pluralizing gesture to the same extent as it is a gesture of

identification, because it "introduces a non-identity ([the collective *a* as *x*] *rather than y*) into identity" (Lindahl, 2018, p. 326, my emphasis). Self-inclusion, or self-recognition, as *x* is paired with self-exclusion, or self-misrecognition, as *y*. It is "alienating to those who would range themselves under the pennon of *y*" (Lindahl, 2018, p. 326). For such members, to represent the collective *a* as *x* counts as an *exclusion* from a collective they could recognize as their own, and hence as its misrecognition. This is what Lindahl calls "untoward 'othering'" (Lindahl, 2018, p. 322). It is contested in claims to transform the terms of inclusion and exclusion in such a way that what before was excluded and thereby misrecognized, may now be included as "one of us." Furthermore, distinguishing the collective *a* from other collectives through its representation as *x*, may also be met with claims that it is *inclusion* to the collective *a* by means of representing it as *x* that misrecognizes the political identity of those included and who would rather recognize themselves as members of a collective *b*, irreducible to the law of the collective *a*. This counts as an "untoward 'selving'," and may be contested in claims to transform the terms of inclusion and exclusion in such a way that what before was included, and thereby misrecognized as "one of us," is now excluded and released to its strangeness, to what is other to "us." "The dynamic of representation," Lindahl concludes, "ensures that collective self-recognition involves not only collective *self*-misrecognition but also misrecognition of the *other*, giving rise to demands for inclusion in and exclusion from the collective" (Lindahl, 2018, pp. 322, 326).

Unlike in Badiou's understanding of constructivism, in which, within ontology, a collective (like the French state) simply is what it can already name and order, for Lindahl, "[a] collective is never simply itself and never simply different from the other; *entwinement* is the primordial condition that governs the encounter between collective self and other" (Lindahl, 2018, p. 322). "Entwinement" is a name for the paradoxical totality of the legal collective that cannot coincide with itself, but is rather inhabited by, to borrow Agamben's term, "indistinction" between self and other. For Lindahl, this indistinction does not give rise only to the possibility of the state of exception in Agamben's sense. Rather, it is the possibility of the transformative politics of boundaries: to include what was excluded and to exclude what was included.

Lindahl insists on the fundamental ambiguity and contestability of recognition as a cognitive-epistemic activity that seeks to authoritatively establish the identity of the represented collective: "collective recognition is always, to a lesser or greater extent, collective misrecognition" (Lindahl, 2018, p. 327). Hence, it will be seen as dominating, violent and something to challenge. Contingently articulated legal totalities cannot be internally consistent, but they are always split: the authoritatively represented and recognized collective is inhabited by internal resistance and otherness.

Lindahl endeavors to articulate this otherness as politically and ethically rich. His attempt contrasts with both the Luhmannian evolutionary account and the Agambenian nihilism that see the internal otherness as fuel either for the system's functional perpetuation or for the operation of the governmental apparatus with no other task than targeting this otherness as bare life beyond legal protection. At stake

is how contingent and inconsistent collectives can deal with their limits that they seek to draw between themselves and otherness in such a way that would not signify their absolutization with no regard to the irreducibility (impotentiality) of life and reality to their limited perspective.

A situation of rupture and inoperativity amounts to what Lindahl calls "the summons to collective self-assertion," to authoritative indication and identification of the existence and identity of the collective (Lindahl, 2018, p. 331). It is a situation in which the indistinction between the self and the other becomes exposed. This leads to disorientation of joint action, to its "deactivation" and thus, Lindahl argues, calls for a response on the part of those claiming to be the collective's authoritative representatives. Their response re-articulates legal boundaries in such a way that *will have allowed* the collective to overcome the challenge to its existence. This means, as we saw above in the discussion of the temporal paradox of representation, that each response to a rupture is a *wager* the success of which — and, ultimately, the authoritativeness of which — hinges on whether it can be said "on hindsight and for the time being [to have gained] wide allegiance among its addressees and motivate[d] them to act as a group that can deal with challenges to its contingent existence" (Lindahl, 2018, p. 329, emphasis omitted). *Authority* is, then, for Lindahl, above all about deciding, in a situation of collective disorientation, what the collective response to it is and how the collective will overcome it and go on, without being able to resort to any objective, pregiven criteria of collective identity. Such an initiative opens the possibility of the collective perspective to continue.

The initiating decision, and, therefore, authority itself, is not absolute. It is dependent on its "success": on its ability to respond to collective disorientation in such a way that the necessary self- and other-misrecognition involved in it will not immediately again prevent the continuation of collective action under the reformulated default setting. Only if the response is taken up by (sufficiently many of) its addressees and recognized by them as an authoritative representation of "who we really are," taken by them as the premise of their joint action, will the decision gain some security in its meaning as authoritative, rather than mere arbitrary command. Authority is, thus, not only about "leading the way" and "commanding," Lindahl insists, but it is also about becoming seen as "obedient to the collective identity, seeking to articulate, retroactively, what is truly important to us" (Lindahl, 2018, p. 334). Lack of such recognition would indeed mean that law exists only in a state of virtuality, without actual effectivity to concretely orient individuals. Lindahl insists that a distinction is to be drawn between mere arbitrariness of commands and contingent acts of authoritative decision-making. The "as if," the representation of acts as "our" acts are retroactive achievements that will have allowed a particular, positive collective perspective to open up. However, the fiction remains necessarily contestable. There are no guarantees that all those addressed will, in fact, recognize themselves as "rightly" represented by it.

The core of responsive ethics of legal authority is thus this: in response to a challenge, rupture or conflict in the practical context of the legal collective, legal authorities may re-draw those temporal, spatial, subjective and material boundaries

that determine a range of practical possibilities of behavior for the legal collective in question. In other words, they answer again and differently, on behalf of the legal collective, to the practical question *who ought to do what, where, and when*. An important task of legal authorities thus is to specify, over and over again in response to always particular situations, *that* there is a collective and *what kind* of a collective this collective actually is. The legal collective gets continuously re-identified and re-presented by its authorities as a response to always particular situations and challenges and as always under at least somewhat different light: as now including a practical possibility it previously excluded, or vice versa.

When legal authorities confront situations where they must determine what the law is and how it responds to the situation at hand and the practical question it poses, they do two things, one directly and the other indirectly. Directly, they determine what is legal or illegal behavior in the situation at hand. By so doing, they also *indirectly* exclude what is irrelevant from the law's perspective, what counts as *a*-legal. In Lindahl's terms, the four-fold boundaries of law can manifest themselves as *limits* between the inside and outside, as limits that can be expanded or contracted. What before was illegal, can become legal, and vice versa, but also what before was irrelevant from a legal collective's perspective, like, say, forms of domestic violence, can become relevant to it, and vice versa (Lindahl, 2013a, p. 174; Lindahl, 2018, pp. 295-296). But second, transformability also means that a collective identity is irreducibly *finite*. No matter how the distinction between what is relevant for the legal collective, and thus legal or illegal, and what is irrelevant for it is drawn, this limit itself cannot be effaced. This means that a collective identity is transformable but never unlimited. It can only transform the limit between itself and what remains other to itself in a manner that *it can recognize as its own*; that is, a collective can only include and exclude practical possibilities in a way that its representing authorities judge as not undermining its own existence.

As we already saw with Luhmann and in our discussion of law as the immune system of society, law's transformability is *tied to its self-preservation*. Self-transformation cannot be about self-destruction. "[C]ollectives are finite in that their authorities frame the questions to which they respond in such a way that their response *is consistent with the continuation of joint action*" (Lindahl, 2018, p. 298, my emphasis). In other words, they seek to respond to challenges in such a way that the response will have been seen as consistent with, obedient to what the collective "really" is, by sufficiently many of its addressees – although it never simply *is* consistent, as collective self-recognition is constitutively tied to self-misrecognition.

The task of authorities is thus to uphold and modulate the distinction between inside and outside, self and other, all the while preferring the first term. Lindahl's account reaffirms the significance of creating an appearance of consistency for the legal collective's self-preservation. Unlike Luhmann, Lindahl insists that self-preservation has also a political and ethical dimension to it, because it always concerns a contingent representation of what is claimed to be *common* and *joint* to a selection of individuals and groups. The consistency of authoritative decisions with the collective identity remains, in principle, always contestable. Only an

acknowledgement of this contestability keeps contingent legal orders from collapsing into sheer nihilistic relativism and constructivism, or so Lindahl argues. Furthermore, what Lindahl calls a *fault line* "signals a *non plus ultra* for joint action" (Lindahl, 2018, p. 282). A fault line signals the excess of practical possibilities that remain strange to a legal collective that it cannot, at least for the time being, recognize as its own. The collective can re-identify itself in what was other to it, but the cleavage *per se* between self and other cannot be overcome. *Self-restraint*, or self-suspension, may be a mode, Lindahl suggests, with which the legal collective can indirectly recognize its own contingent finitude. Self-restraint may be a way to deal with the fact that transforming the legal possibilities by including what was excluded may not correctly recognize — do justice — to claims to the "right" to a form of life.

What Lindahl calls a-legality can only be indirectly acknowledged by the legal collective. Nothing is a-legal as such; it is what in a claim *x* remains untranslated into the legal idiom (Lindahl, 2018, p. 296). A challenge appears as a "weak a-legality," if it is responded to by transforming the extant legal boundaries, by recognizing the other as one of us and by including what previously was excluded. "Strong a-legality" is, by contrast, only indirectly indicated by the transformed default-setting as what still remains in excess of our collective possibilities, as being beyond the legal collective's transformed range of practical possibilities (Lindahl, 2018, pp. 298-299). The degree of the radicality of the question thus depends on the response the authorities give to it. It depends on how much they deem necessary to transform the default setting of joint action and how much of the challenge the legal order can recognize as a legally valid challenge implying changes to its default setting:

> the challenge of the KRRS could be responded to by, perhaps, transforming the WTO's default setting of environmental protection and sustainable development. [...] [N]ew default settings of free global trade would evince behaviour that, although initially unordered, is to a certain extent orderable for the WTO. The outcome of the new default setting of joint action would be that the WTO shifts, perhaps in ways that were unexpected for the protagonists, the limits of what counts as free global trade. [...] [However,] there is also a "strong" dimension of a-legality, namely, challenges insofar as they are unorderable for the respective collective. The KRRS' aim to create Village Republics organised on the basis of the principle of food sovereignty is inimical to the principle of free global trade. [...] The surd domain of what is unorderable, ungovernable, for a collective is also the privileged domain of constituent power, the fount whence another collective can emerge. It is the domain of innovation, at times of radical innovation: not the tapping of a range of extant possibilities but rather the emergence of a new range of possibilities for joint action. (Lindahl, 2018, pp. 298-299)

Food sovereignty claimed by the KRRS is irreducibly at odds with the collective perspective offered by the WTO and its limited possibilities of transformation. A fault line, rather than an expanding and retracting limit, separates these two collectives.

How, then, might the WTO respond to the claim for food sovereignty? The notion of *collective self-restraint* names a situation in which a collective re-affirms itself by *indirectly* recognizing the other *as other to itself*, as incongruent with its perspective, and does not seek to bring it within itself through boundary-transformation. For example, "[a] collective declares that a domain of behaviour is off bounds for it; it recognises that this domain ought to remain unordered from [its] first-person plural perspective [...]" (Lindahl, 2018, p. 358). As a response to the claim that the KRRS's Village Republics ought to remain outside global trade, the WTO could, for instance, release peasant communities from directed obligations related to the global trade of seeds (Lindahl, 2018, p. 343). Legal authority would thus work toward creating the conditions for the opening and preservation of another collective.

Furthermore, instead of (only) including novel possibilities to itself, the collective may postpone its acts of boundary-setting, deferring them in time and thereby giving space to struggles for representation over how the collective ought to be represented and *which collectives* call for representation. Suspending its operation, the legal collective gives space to other collectives to indicate their presence and articulate their identity irreducible to "our" tasks and points of action. "Staying collective self-assertion amounts to allowing both dimensions [*that* we are a collective and *what* we are as a collective] of struggles for recognition and representation to come out into the open" (Lindahl, 2018, p. 342). Furthermore, as struggles for representation and recognition are also struggles for authority, for who gets to speak on behalf of a collective, and which are the collectives in need of authoritative representation, suspending the operation of decision-making and boundary-drawing also gives space for the staging of the contingency of authority-claiming representations and exhibiting the conflict between non-institutionalized and institutionalized forms of authority (Lindahl, 2018, p. 243).

Self-restraint may also be formally similar to the Schmittian exception, namely, the non-application of rules that ought in principle to be applied to the situation at hand. Lindahl insists, however, that, here, the exception has an inverted sense to Schmitt's and Agamben's notions of the exception. For Schmitt, the exception to the rule allows for legally non-mediated political governing of the situation. For Agamben, such suspension of the rule has gradually become the normal situation in which the legal order is in force only in an inoperative mode. This empties the significance of, for instance, fundamental rights, and leads to the governance of living beings exposed to sovereign violence. For Lindahl, the exceptional, requiring exceptional measures, can only reductively be understood as simply the enemy (Schmitt) or the bare life (Agamben):

> The strange, in its strong dimension, speaks to a fault line of collective action, not to a variable limit thereof: to something that resists inclusion as one of us because it is the other (in ourselves) of us. In a word, the exception speaks to *singularity*, to that which eludes a dialectic between the general and the particular. [...] Instead of being an act of direct recognition – *we can* include the other (in ourselves) as one of us – it is an indirect form of recognition, one

> that holds back to hold out insofar as we* *cannot* include the other (in ourselves) as one of us without destroying the other's identity/difference. (Lindahl, 2018, pp. 344-345, original emphasis.)

When facing something singular that resists being recognized and represented in our terms, we* can make an exception to the application of our law. Here, the contingency of legal authority is exposed in its impotentiality, as we* *can not* apply our law. Thereby, we* resist the absolutization of our own perspective and take care not to destroy that what remains strange to us. Self-restraint is "the opposite of universalization," as it is about self-limitation to counter "the danger of imperialism," latent in attempts at constructing all-encompassing positive legal orders, and an attempt at preserving "the strange as strange," as irreducibly different, unrepresentable and yet not an enemy to be destroyed.

As we saw above, within the immune paradigm, the *anomos* is conceived an existential threat to the collective to which the sovereign needs to respond by introducing anomy within the commonwealth, thus itself becoming the threat against which it seeks to protect the collective, turning everyone into bare life. Self-restraint as the ethical gesture does actualize anomy within the collective. It does so, however, not in order to destroy or control bare life but, rather, in order to preserve the singular, anomic other in its strangeness and potentiality not to be reduced to our law. Self-restraint is a way to deal with the inconsistent completeness of the legal totality, with the fact that its ability to hear and respond to challenges is limited, and, therefore, never without alternatives. By restraining its operation and leaving some questions legally unanswered, the legal collective gives space for such formulations of the problem at hand that remain beyond its capacities of understanding. Thereby, it also indirectly recognizes that there are forms of rationality that are incongruent with it. Self-restraint is a way for a legal collective to obliquely acknowledge that there is a reality that remains inappropriable for it.

Self-restraint maintains the collective in a state of indistinction of the self and other not in order to "make everything possible" in the sense of legally non-mediated political domination, but rather in order to exhibit the political pluralization that always takes place when the boundaries of a legal totality are drawn. Clearly such an ethics is risky. It remains a political question whether self-suspension constitutes an act of self-betrayal or even self-destruction (Lindahl, 2018, p. 345). Legal authority as indirect recognition of the other (in ourselves) as other than us that resists inclusion also needs to preserve the collective that it claims to represent. Self-restraint is also about self-assertion. For Lindahl, then:

> [t]he responsive ethics at work in asymmetrical recognition suggests that the authoritativeness of an authoritative politics of boundaries turns on asserting ourselves as a collective by including the other (in ourselves) as one of us in a way that also makes room for preserving the other (in ourselves) as other than us. (Lindahl, 2018, p. 346)

Limited autonomy regimes, Lindahl argues, such as regimes that grant a minority political control over a certain territory, are instances of the restrained collective self-affirmation. They are examples of the state legal collective's self-affirmation because, first of all, the political other is (mis)recognized as a "minority," which means that the other is included within the collective as "one of us." A collective can only count as a "minority," when it is included in a larger collective featuring a "majority" collective. The autonomy regime is thus limited by "[t]he constraints [that] delineate the scope within which the [state] collective is prepared to recognize a minority as other than us, while also including it as one of us: plurality within unity" (Lindahl, 2018, p. 357). Members of the minority group are treated also as members of the state legal collective, although in some respects the state withdraws from imposing its legislation on them, thereby indirectly recognizing its inability to accommodate political-legal alterity:

> The collective restrains itself in the double sense of a deferral *of* self-assertion, such that a struggle for recognition and representation [of the "minority" group] can be staged, and deferral *to* a group that demands recognition by ceding to it the representation of what counts as its unity, qua minority. In this way, a collective indirectly recognizes the other (in ourselves) as other than us, where "us" adverts to the authoritatively mediated first-person plural perspective of the broader collective. In brief, limited autonomy regimes are institutional instantiations of restrained collective self-assertion: we* *can* include the other (in ourselves) as one of us and exclude the other (in ourselves) as other than us. (Lindahl, 2018, p. 358, emphasis in the original.)

In Lindahl's interpretation, restrained collective self-assertion is also what the European Court of Human Rights does, when it gives leeway to the Member States through the mechanism of the national margin of appreciation to answer a legal question concerning the interpretation and application of human rights in a particular situation (Lindahl, 2018, pp. 351-352). By leaving it to a Member State to decide whether it allows a certain kind of behavior, like in the Lautsi case[64] the display of crucifixes at public schools, the Court restrains its legal powers it could have used but did not. The Court could have opined that the mandatory display of crucifixes in Italian public schools violates the rights to education and the freedom of thought, conscience and religion of the applicant under the European Convention on Human Rights, but it did not. Instead, it gave space for the Italian authorities to decide on that matter. As the legal authority of the legal collective that is the Council of Europe, the Court recognized Italy both directly and indirectly: directly insofar as it recognized Italy as a Member State bound by its human rights obligations and the Court's authority, but also indirectly insofar as it exercised self-restraint and refrained from using its own powers to give space to the powers of Italy. In this way it indirectly recognized that Italy is another legal order that the Council of Europe cannot fully assimilate into itself (Lindahl, 2018, pp. 352-354).

[64] ECtHR (Grand Chamber), *Lautsi and Others v. Italy*, 18 March 2011.

The possible intimate relation of the indirect recognition of alterity by self-withdrawal to *prudential* (and immunitary) considerations of the ability of the self to continue operating is clear in this example. Given that membership in the European Council and the European Convention on Human Rights is voluntary, the Court needs to prudentially seek to secure its continuing existence by not simply imposing its commands on every possible occasion. "A prudential dimension is," Lindahl argues, "an ingredient feature of politics" (Lindahl, 2018, p. 308, emphasis omitted). The politics of legal boundaries, self-restraint included, is intertwined with the authority's need not simply "to articulat[e], monitor[…] and uphold[…] a valid order [but also to] secur[e] the conditions for *order*" (Lindahl, 2018, p. 308, original emphasis). To make an exception in order to preserve the strange as strange, as other to us, comes hand in hand with self-preservation and the creation of conditions suitable for it. There is no overcoming of this ambiguity insofar as politics is thought as a dimension of positive, extant normative orders.

The act of self-restraint is irreducibly an act of power that can also be contested as a misrepresentation and misrecognition of "our" collective. The Lautsi case is a poignant example of the ambiguous success of restrained collective self-affirmation. It is not difficult to oppose the Court's representation of Europe on grounds that it, as Lindahl himself says by quoting Daniel Augenstein, "perpetuates 'national majoritarian traditions at the expense of protecting religious minorities'" (Lindahl, 2018, p. 352; Augenstein, 2013, pp. 470-471) and, thereby, misrecognizes a Europe that prefers religious freedom and plurality to social cohesion advanced by suppressing minorities. The responsive ethical act that was the Court's use of the margin of appreciation that indirectly recognizes a Member State as another legal order that it cannot fully include within itself, may well look like an act of symbolic violence and hostility to plurality that completely misrecognizes what the Council of Europe ought "really" to be about.

By implication, there is no way to guarantee that the indirect recognition of the other as other than us is not a misrecognition of ourselves or of the other. After all, our fault lines do not *necessarily* lie precisely *there* where the legal authorities have drawn them. There are no guarantees that the legal translation of a question addressed to it appears as a just translation, and the answer as a just answer, to those who have posed the question. There is an inevitable failure even in the law's success. "This success is," as Lindahl writes:

> irreducibly ambiguous: authority, to be such, must hearken to summons; but an ineradicable positivity animates its response[.] The congruence *and* incongruence of question and response, of other and self, goes to the heart of what authority is about[.] (Lindahl, 2018, pp. 330-331)

Responsive authority is never simply ethical, simply for "the good." It always risks being seen as someone who does not understand the situation, the claim addressed to it nor what "we" "really" are. Therefore, it verges on "the evil." No

positively existing order is fully free of violence and imposing itself from the outside on beings who would "prefer not to."

6.9 Conclusion

From the perspective of messianic politics, Lindahl's account is probably not radical enough. Unlike Agamben who seeks to formulate the coming to an end of the law and post-juridical forms-of-life as a response to sovereign violence, Lindahl sees in the paradoxical structure of authority political promise that cannot, however, be a promise of the end of violence *tout court*. What Lindahl calls "the in-between" is the paradoxical "zone of indistinction" between the self and the other: "a relation and non-relation between self and other" (Lindahl, 2018, p. 284, emphasis omitted). The boundary between the self and the other does not belong to either side, but resists appropriation by either of them. Although drawing boundaries does give rise to the difference between the self and the other, it is irreducibly also the always-present possibility of disorientation and inoperativity *internal to* all joint action. Lindahl will insist that for every representation, there is an irreducible non-representation, for every recognition, a misrecognition, for every identification of something as something, a pluralization of this something that haunts all authoritative claims to re-cognize what the collective "truly" is. According to Lindahl, it is, thus, an important *normative* task of legal authorities to seek to respond to claims of misrecognition and misrepresentation. They can do so by probing the possibilities of transforming the default setting of legal boundaries in order to include those who claim to be unjustifiably excluded, or by restraining the application of the legal solution in order to exclude those who claim to be unjustifiably included. Each new act of authoritative boundary-drawing or boundary-suspension remains, however, questionable. Collectives are "irreducibl[y] contingen[t] because there can be [...] no inclusion, no unification, no identification, without [...] exclusion, pluralization and differentiation" (Lindahl, 2018, p. 337).

Lindahl's account thus is interestingly close to, and far away from, Agamben's. Remember that for Agamben, the problem is the "negative foundation": putting two separate terms (like voice and meaning, bare life and law) into a relation with each other in such a manner that the first term functions as the foundation for the second, but only as excluded. Bare life is excluded from law, and thereby captured in the state of exception in which its biopolitical dominance is rendered possible. Voice and bare life are presupposed as different from meaning and law, other to and excluded from them, although both terms of both pairs are constituted only through their relation. A relation is both "attractive and repulsive" (Agamben, 2016, p. 272) – or as Lindahl puts it, it "joins and separates." Deactivation of such constituting relations does not destroy the elements, but rather exhibits them in a *lack of relation*. Following Giorgio Colli's reading of Aristotle's characterization of the activity of thought as *thigein*, "touching," in which Colli defines this "contact" as "the indication of a representative nothing,"

Agamben gives the name "contact" to this absence of relation that lets two points be in contact although "between them there is nothing" (Agamben, 2016, p. 237, citing Colli, *La ragione errabonda*).

For Agamben:

> it is this *thigein*, this contact that the juridical order and politics seek by all means to capture and represent in a relation. Western politics is, in this sense, constitutively "representative," because it always already has to reformulate contact into the form of a relation. It will therefore be necessary to think politics as an intimacy unmediated by any articulation or representation: human beings, forms-of-life are in contact, but this is unrepresentable because it consists precisely in a representative void, that is, in the deactivation and inoperativity of every representation. To the ontology of non-relation and use there must correspond a non-representative politics. (Agamben, 2016, p. 237)

Lindahl's response to this would be, I think, that Agamben's account of legal representation is one-sided. From a Lindahlian perspective, although legal orders are representative, them being paradoxical implies that this representation is always inhabited by non-representation that the legal collective can indirectly indicate in self-restraint. Both Agamben and Lindahl seek to express the contingency, non-necessity and a certain artificiality of all forms of order and positive forms of community, and to save the dimension of potentiality from its being hidden away by entrenched forms of representation. Lindahl's "in-between" as a "hiatus between question and response" (Lindahl, 2018, p. 339) is not too far from Agamben's "contact" that is "an absence of representation, [...] a cesura" (Agamben, 2016, p. 272). It also seeks to express the "underside" of all representation and bringing-into-relation: that no representation is necessary and without alternatives, that every relation lacks a "ground in Being" and that every order is an effect of an operation of unification of what lacks a pregiven order.

Whereas Agamben's emphasis falls on "the end," on the deactivation of extant legal identities without positing new ones, Lindahl's account keeps identity and its inoperativity together. For Lindahl, politics of legal boundaries operates "in" the paradox, both undoing *and* reformulating collective representations and identities. It falls beyond the possibilities of this work to evaluate in further detail Agamben's proposal for "non-representative politics" and in what way, if any, the notion of the "form-of-life" would be able to avoid representation *per se*, given that it still denotes a positive collective way of life (like that of the Franciscans).[65] For Lindahl, inoperativity

[65] In addition, the Franciscan monastery order would undoubtedly also fall within Lindahl's rather expansive notion of a "legal collective." This notion is independent of substantive identificatory criteria and instead emphasizes, as we have seen, self-individuation: that a collective identifies itself through representative acts (the meaning of which as representative always remain a wager and thus contestable). Alexander Ferrara argues, quite straightforwardly, that Lindahl's account of the irreducibility of representation and inclusion/exclusion challenges Agamben (and such figures of post-deconstructive thought as Jean-Luc Nancy and Esposito) to explain how a community without representation and point would be conceivable at all and distinguishable as a political community from mere humanity (Ferrara, 2019, pp. 373-374). My hunch is that when Agamben wishes to give a positive

is a moment immanent to the operation of law, a moment of the exposure of the indistinction between law and non-law, that makes possible both the transformation of the "default setting" of the legal order and its suspension in a way that seeks to respond to a claim to recognition. It can include what was excluded or exclude what was included, but it is constitutively unable of achieving justice in any absolute sense. For Lindahl, politics cannot only be conceived as being about bringing to an end. By contrast, it ought to obey "the imperative of politics, namely, the commitment of a responsive ethics to holding open the in-between that governs the encounter between collective self and other" (Lindahl, 2018, p. 347). Politics of legal boundaries ought not be brought to an end (Lindahl, 2018, p. 204), although bringing to an end is certainly a central element of such politics that seeks to hold open the threshold between the self and the other. Not to blindly enforce the self's perspective as if the other simply counted as nothing may require self-suspension. In a way, responsive ethics is about politicizing the immunologic geared to self-preservation, as it is about exhibiting the contingency and inconsistency of the legal collective and about giving space to the conflict over the existence of forms of collectivity and their identity, rather than simply seeking to make political plurality invisible. For paradoxical legal totalities, restrained collective self-assertion may well be a way to seek to take responsibility for their existence that they can never fully justify in neutral terms.

formulation to the inoperative community as a form-of-life (like the Franciscans), it becomes indeed impossible to detach the community from representation *per se*.

7. Conclusion: Orientations in legal formalism and the implications of paradox for legal and political thought

The aim of this work has been to analyze different accounts of law as a totality, as one kind of "form" and "formalization" of norms, communications, behaviors and life, and to pinpoint various orientations to the problem of the limits of such a totality by analyzing the work of Hans Kelsen, Niklas Luhmann, Giorgio Agamben, Alain Badiou and Hans Lindahl.

I have used as a methodological, heuristic tool Paul M. Livingston's notion of the metalogical choice, or dualism, and his mapping of the three orientations of formal thought to totality: the constructivist-criteriological, the paradoxico-critical and the generic orientation. As we have seen, the categorization of the theorists analyzed is not straightforward, but I have modified the mapping when necessary. Kelsen may arguably be read as oscillating between the first two orientations, and, thus, also between metalogical choices. Luhmann's categorization also presents some difficulties, as he explicitly recognizes the irreducibility of the inclosure paradox for law (and thereby prefers the inconsistent totality), and yet he argues that when sociologically observed, the legal system operates on grounds of what could be called a "pre-Cantorian ignorance" of its foundational inconsistency, always seeking to appear consistent by making its paradox invisible. I have, thus, labeled Luhmann a "paradoxico-constructivist" and "paradoxico-evolutionary" thinker who prefers to observe the conditions for the continuous operation of the system to thinking about the political implications of its inoperativity. Agamben's and Badiou's classifications in this work follows Livingston's: the first is a paradoxico-critical and the second a generic thinker. What brings Agamben and Badiou together substantively, however, is a certain rejection of law as a site of politics, and the emphasis on politics beyond the boundaries of law. Lindahl is a representative of the paradoxico-critical approach who, by contrast, sees law as a site of politics.

I have argued that we encounter an inclosure paradox, if we seek to draw the limits of law within the law itself and by its means. This is, at least, the position held, in different ways, by those theorists who make the metalogical choice in favor of inconsistent and complete totality, rather than consistent, but incomplete totality. I have argued that for a legal theory that takes seriously the autonomy of modern positive law, the recourse to the metalogical choice in favor of the consistent, but incomplete totality is not a viable option. Resorting, as the so-called "constructivist-criteriological" positions do, to metalanguages, such as moral human rights or objective legal science, that would complete the positive legal form by securing the consistency of its limits from a neutral outside position, is impossible if the legal system is understood as autonomous. Also, Badiou's generic orientation, although

otherwise harshly critical of constructivist positions, shares with them the preference for consistency, and for this reason, his position is problematic from the perspective of legal theory that sees in modern positive law an autonomously (self-referentially and hence inconsistently) operating system. It must, however, be remembered that seeing in the legal system a self-referentially operating totality is based on a metalogical decision taken in a situation of undecidability (and thus non-deductively), which implies that seeing in it a consistent, but incomplete, totality remains an option with different implications, some of which I have sought to pinpoint in the chapters on Kelsen and Badiou.

From the perspective of formal legal thought that prefers to see in the legal totality the inclosure paradox, the legal system operates autonomously, on grounds of its closure, which implies that it will understand every question posed to it in legal terms and give a legal answer to each question. It is complete in this sense. Kelsen (if read against the received interpretation as making the metalogical choice in favor of the complete, but inconsistent totality), Luhmann, Agamben and Lindahl all share this basic insight, although they interpret its significance very differently and draw different implications from it. Kelsen (conventionally interpreted, as preferring consistent and incomplete legal totality) and Badiou form an odd pair, insofar as they, regardless of their enormous differences, both make the metalogical choice in favor of the consistent, but incomplete totality. Kelsen's intentions (in particular when conventionally read) are epistemological (constructivist-criteriological), Badiou's political, but their common point is to view the legal form as consistent, although completable by an external truth (the legal scientific basic norm and the political truth of generic equality, respectively).

I have, thus, also sought to show that when the limits of the legal totality are taken into focus, the relationship between law and non-law, in particular law and politics, comes into view. When the legal totality is taken to be at the focus of post-metaphysical (or post-onto-theological) thinking, the nature of this totality as contingent becomes visible, and therefore also the problems that the contingency implies: the legal system or collective is unable to legitimate its existence and identity in response to challenges in any other way than by drawing from its own resources – which precisely is the problem in the first place. To observe the legal system as a paradoxical, self-referential totality implies that no fully satisfying neutral metalanguage that could solve this problem is forthcoming. This poses a challenge to theory to think about the ways in which the problem of nihilistic relativism, the mere perpetuation of self-referential social systems, can be avoided and how the normativity of the finite legal totality can be rethought.

I have argued that Luhmann's evolutionary account of the legal system downplays the political significance of the drawing of the limits of the legal totality, because it does not consider "the double inscription of the political," but reduces politics to what the institutional political system can recognize. For Agamben, the paradoxical articulation of law and politics is exposed in the state of exception, which, in his analysis, has become the new normal, requiring "messianic" politics that deactivates the whole nihilistic sovereign-legal apparatus. For Badiou, what can be

said within a language, and by implication a legal system, is pre-determined by that language, and politics, the desire to say the unsayable, is thrown fully outside language, and the legal system, to a position from which law's incompleteness, its incapacity to offer space for justice and politics, can only be disclosed. Politics is, then, the operation of seeking to carve that place of the self-determination of the political subject that is "nothing" within the legal system, incongruent to it, and therefore wholly outside it. Furthermore, it must be noted that as for Luhmann, the legal system needs to make its foundational paradox invisible and seek to appear consistent, his theory of law as a process of deparadoxification, with its emphasis on the need for consistency, may quite logically be completed by Badiou's theory of politics, as Emilios Christodoulidis has suggested (and to whose work I have shortly referred in my discussions on Luhmann and Badiou). It would require further research to show if and how Badiou can account for legal change after the law's political transgression in and by the event and in the post-evental truth procedure. After all, he seems to reject the view of the legal system as inconsistent, which is, for paradoxico-criticism, precisely the condition of legal transformation. For Lindahl, politics is about the dynamism of the inconsistent boundaries of a legal collective and its legal order, about their authoritative transformation that can take the form of including what was previously excluded or excluding what was previously included. The very inconsistency and paradox at the heart of the legal order is, for Lindahl's paradoxico-criticism, also the site of the politics of its limits: how the order deals, always ambiguously and with no un-contestable outcome, with claims that challenge how it draws the limit between itself and its others.

We have seen that although the access to objective morality from which to evaluate law is impossible, if modern positive law is understood as autonomous, this does not necessarily imply a straightforward reduction of law to a nihilistic relativism in which nothing counts except the functional operation of the legal system and its self-perpetuation. Through the discussion of the "immunologic," nihilism and the possibility of politics, my aim has been both to show the danger of nihilistic relativism and map responses to it. Here the core problem has been how contingent legal orders may deal with their limits in such a way that does not render their perspective of reality absolute and imperialistic. With Lindahl and Agamben, I have sketched a politics of legal boundaries that both directly and indirectly seeks to attenuate the violence implied by the emergence of particular legal perspectives. However, the possibility of a legal order counting as political dominance cannot be finally excluded — at least insofar as we are not ready to renounce legal ordering of reality and life altogether.

From a paradoxico-critical perspective, legal order is only ever capable of giving a legal answer to a challenge that questions the way it deals justice (we can name this the "reflexivity problem of justice"), but such an answer is nevertheless capable of transforming the limit between law and non-law, although in a way that remains contestable. That the identity of a legal order is inconsistent, that a legal order at any given moment both includes and excludes itself and its other in a way that cannot be justified in any ultimate sense, allows for an open set of situational re-adjustments of

its limits, generalizations that never become a consistent and complete universal set of full inclusion.

Here a notable difference between Lindahl's paradoxico-criticism and Badiou's generic orientation arises. While for the latter, the vector of political transformation is from counting as nothing in a social situation to counting as everything within it, from a zero-degree appearance to a maximal appearance, and hence from exclusion to inclusion, for the former the vector may head in both directions. The important point that Lindahl makes is that inclusion is not the only possible positive normative move to make, but exclusion from a contingent positive order and the clearing of space for another, incongruous collective may also be what is claimed in the politics of boundaries. (Although it must be added that both Agamben and Badiou do argue for exclusion in the sense of the necessary dis-identification of the political subject from its extant social identity.) For Badiou, the political imperative reads: What was nothing in this world must become everything! According to Agamben, the imperative is: Bring the sovereign legal apparatus to its end! For Lindahl, instead, it says: Set collective boundaries in such a way that politics of legal boundaries is not brought to an end!

All these formulations can be seen, although to show this would require some further research, as ways of both countering relativistic nihilism and *re-thinking universalism* for post-Cantorian (paradox-conscious) formal legal-political thought: rethinking universalism after the Universe, after the complete and consistent, comprehensive legal-political totality has been shown impossible. It seems to me that for both Agamben and Badiou, the new universalism consists in bringing to thought what Badiou calls the "generic set" and Agamben the "form-of-life." These formulations are about a non-positive universal collectivity that is, in a somewhat bizarre way, singular because strictly unrecognizable by extant, authoritative articulations of collective identity and what subtracts from all of them. Such subtraction gives rise to a generic or aspecific collectivity of strictly equal beings, with no predicates that would represent them and thus produce inequalities between them. While both Agamben and Badiou seem to, accordingly, argue for a notion of politics as anti-representational, Lindahl argues for the irreducibility of the paradox of representation and, hence, also for a politics of the boundaries of positive orders. For Agamben and Badiou, the new universality is about an aspecific collectivity of singular "whatever beings," as Agamben puts it (Agamben, 1993, p. 1). Such a collectivity is not a single positive order, but only unfolds in the mode of subtracting from and dis-identifying with extant, inequality- and violence-producing collective identities, legal ones included (which only allows, for Badiou, the maximal positive appearance of what before counted as nothing). By contrast, Lindahl's universalism is about keeping open the political space for staging the paradoxical limits of all extant, positive orders and collectives.

Finally, and in conclusion, I want to suggest that the investigation into the paradoxico-criticism in legal theory has pinpointed a position in formal legal theory that abandons legal formalism as naive legal positivism, the view of the legal system as both consistent and complete, as a system that would be able to complete itself consistently, without any resistance from reality to which it applies itself. It also

abandons naive legal realism, the view that legal norms are ultimately reducible to mere social facts. What we have instead is a sort of "chiasma" between positivism and realism in law. We could call it "positivist realism" or "realist positivism" that recognizes the limit between law and reality as inconsistent and as the place where the authority of law to form itself into a unity encounters the resistance of non-law that it can neither fully ignore (positivism) nor fully embrace (realism).

That legal orders and collectives are not fully positivist means that they are not in absolute control of their own emergence and operation — they are not autonomous in any absolute sense — but require "decisions" always in some way in excess of law's posited structure. That legal orders and collectives are not fully realist means that these decisions are not merely empirical acts, but these acts must always claim to be representative and point beyond themselves to a "form" that could secure their meaning, beyond their mere taking place. "The decision" here marks the limit of legal formalization, something that the legal form needs and yet cannot fully grasp. It is the point at which the law as a formal structure is taken beyond itself (as it cannot fully control it) and yet also given to itself (as it needs it for its emergence).

The realism here is not, as should be clear by now, naive realism that holds that entities exist in themselves as what they are regardless of any structure of representation, recognition, meaning or knowledge which mediate access to them. The point is not a romantic return to the "state of nature." (As we saw with Agamben, the figure of the state of nature is itself a product of a structure.) The realism I have in mind refers rather to what we discussed, with Lindahl, as the "resistance of reality" to the attempts of the collective self to persevere, to preserve itself in existence. If, on the one hand, the only access to reality is mediated by structure, which sets the conditions for meaningful appearance of beings as this or that, every structure still, on the other hand, leaves a remainder, an excess that is beyond its powers of signification and that cannot be brought to appearance by its means. Whereas constructivism only recognizes that something either is because namable by the structure, or is not because unnamable, the paradox announces a site where nameability and un-nameability, structure and reality, cross. When there is both closure and transcendence, merely constructivist position becomes impossible. The post-metaphysical position behind paradoxico-criticism in legal theory could, thus, also be characterized as "constructive realism."

It is with this excess of the real that remains inappropriable that the legal collective needs to constantly deal with. The Sovereign, or authority, both inside and outside the structure, is the name for the shifting limit between structure and reality. Critique of authority is first and foremost self-criticism: the ability of the collective self to indirectly recognize the excess of reality within itself, as well as the contingency and ultimate unjustifiability of its limits. The task of critique is to keep making manifest, "faithfully," we might say with Badiou, the limits of the legal order and the zone of indistinction in which the order and reality cross. Law's "impotentiality," its non-operation or inoperativity is the moment for staging as an open question that there is a legal collective and where exactly its limits lie, how exactly "our" law ought to be distinguished from non-law, as a question to which no single right answer can be

found. Such moments of inoperativity resist the undeniable need of the system to again find closure and render the constitutive inconsistency invisible. The political is what appears as the “para-site” of each established social system (as a site at the limits of each of them) that sutures the systemic, “consistent” interiority to its inappropriable outside, ruining it as pure constructivism.

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